(1)

No. 91-367-CFX
Status: GRANTED

Title: Carol Ankenbrandt, as next friend and Mother of L.R. and S.R., Petitioner
v.
Jon A. Richards and Debra Kesler

Docketed:
August 29, 1991

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Ducote,Richard Lynn

Counsel for respondent: Dalton,Samuel, Weidenfeld,Paul

NOTE: See mail label re dkt dt

Entry	Date	Note	Proceedings and Orders
1	Aug 29 1991	G	Petition for writ of certiorari filed.
2	Oct 9 1991		DISTRIBUTED. November 1, 1991
3	Oct 22 1991	P	Response requested -- HAB. (Due November 22, 1991)
4	Nov 22 1991		Brief of respondents Debra Kesler and Jon Richards in opposition filed.
5	Nov 26 1991		REDISTRIBUTED. December 13, 1991
7	Jan 3 1992		REDISTRIBUTED. January 10, 1992
8	Jan 10 1992		Petition GRANTED. limited to the following questions: (1) Is there a domestic relations exception to federal jurisidction? (2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages? (3) Did the District Court in this case err in abstaining from exercising jurisdiction under the doctrine of Younger v. Harris, 401 U. S. 37 (1971)? Petitioners brief and the joint appendix are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., February 14, 1992. Respondent's brief is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., March 5, 1992. Reply briefs are to be filed with the Clerk and served upon opposing counsel in accordance with Rule 25.3. Oral argument is scheduled for the March Session beginning March 23, 1992.
			**********
13	Feb 5 1992		SET FOR ARGUMENT TUESDAY, MARCH 31, 1992. (2ND CASE).
9	Feb 11 1992		Brief amicus curiae of ACLU filed.
10	Feb 12 1992		Joint appendix filed.
11	Feb 12 1992		Brief of petitioner Carol Ankenbrandt filed.
12	Feb 21 1992		CIRCULATED.
14	Mar 4 1992	X	Brief of respondents Jon Richards and Debra Kesler filed.
15	Mar 16 1992		Record filed.
		*	Partial proceedings and briefs U.S. Court of Appeals, Fifth Circuit.
16	Mar 16 1992		Record filed.
		*	Original proceedings U.S. District Court, Eastern District of Louisiana (SEALED ENVELOPE)
17	Mar 30 1992		ARGUED.

NO. 91-367

Supreme Court, U.S.
FILED
AUG 29 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CAROL ANKENBRANDT,
AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,
PLAINTIFF, APPELLANT, PETITIONER

VS.

JON A. RICHARDS AND DEBRA KESLER,
DEFENDANTS, APPELLEES, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD DUCOTE, ESQ.
OF THE LOUISIANA BAR
COUNSEL FOR PETITIONER
335-337 DECATUR STREET
NEW ORLEANS, LOUISIANA 70130
(504)581-5152

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

QUESTION PRESENTED FOR REVIEW

DO THE "DOMESTIC RELATIONS EXCEPTION" TO FEDERAL COURT JURISDICTION AND THE "YOUNGER DOCTRINE" REQUIRE FEDERAL COURTS TO ABSTAIN FROM ADJUDICATING A TORT ACTION WHICH IS OTHERWISE PROPERLY BASED ON DIVERSITY JURISDICTION, AND WHICH SEEKS ONLY COMPENSATORY MONETARY DAMAGES FOR SEXUAL ABUSE, SIMPLY BECAUSE ONE DEFENDANT IS THE MINOR PLAINTIFFS' FATHER, WHEN A STATE JUVENILE COURT HAS COMPLETELY AND PERMANENTLY TERMINATED ALL PARENTAL RIGHTS AND RESPONSIBILITIES OF THE DEFENDANT FATHER, RENDERING HIM A LEGAL STRANGER TO THE MINOR PLAINTIFFS?

PARTIES TO THIS PROCEEDING

PLAINTIFFS:
Carol Ankenbrandt.
Lorelei Richards, her minor daughter.
Stephanie Richards, her minor daughter.

DEFENDANTS:
Jon A. Richards
Debra M. Kesler

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REFERENCES TO DECISIONS BELOW

TRIAL COURT:

ANKENBRANDT V. RICHARDS (No.89-4244, United States District Court, Eastern District of Louisiana, Judgment rendered on December 10, 1990). Unreported.

ON APPEAL:

ANKENBRANDT V. RICHARDS (No. 91-3037, United States Court of Appeals for the Fifth Circuit, District Court Judgment affirmed on May 31, 1991). Unreported.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C.§ 1254 (1), §2101 (c). The opinion below was rendered by the Fifth Circuit Court of Appeals on May 31, 1991. No rehearing was sought.

RELEVANT STATUTE

28 U.S.C.§ 1332:
DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-

(1) citizens of different states;

. . .

STATEMENT OF THE CASE

Carol Ankenbrandt, a citizen of the State of Missouri, filed this tort action on September 26, 1989, in the United States District Court for the Eastern District of Louisiana on behalf of her two daughters L.R. (born 9/18/82) and S.R. (born 12/13/84) to recover damages for their sexual abuse. The defendants are Jon Richards, Ms. Ankenbrandt's ex-husband and the father of the children, and Debra Kesler, Mr. Richards' female companion. Both defendants are citizens of Louisiana, and jurisdiction was therefore based on diversity of citizenship. On August 9, 1989, the Jefferson Parish, Louisiana, Juvenile Court had entered a judgment under Louisiana Revised Statute 13:1601-1605 permanently terminating all parental rights of Mr. Richards due to the abuse, and permanently enjoining him from any contact with the children. That decision was never appealed and is final.

On December 10, 1990, upon the motion of the defendants, the court, Judge George Arcenaux, dismissed the suit based on the "domestic relations exception" to federal court jurisdiction and the "Younger doctrine" of federal abstention. Plaintiff appealed to the Fifth Circuit Court of Appeals. On May 31, 1991, the Fifth Circuit affirmed the judgment in a per curiam opinion.

REASONS FOR ALLOWANCE OF CERTIORARI

Certiorari should be granted in this case for the following reasons:

1) This decision is in conflict with other decisions of various federal circuit courts of appeal on the same matter.

2) This decision represents an important question of federal law which has not been, but should be, decided by this Court.

DOMESTIC RELATIONS EXCEPTION

First, 28 U.S.C.§ 1332 makes no mention of a "domestic relations exception." This Court first decreed that federal jurisdiction does not extend to divorce and alimony cases in dicta in Barber v. Barber, 62 U.S. (21 How.) 582 (1859). In Simms v. Simms, 175 U.S. 162 (1899), that dicta was validated. Later, in Ohio ex rel. Popovici v. Agler, 280 U.S. 389 (1930), the exception was reiterated and justified, since those divorce issues formerly belonged to the ecclesiastical courts. Child custody matters were added to the parameters of the exception in In re Burrus, 136 U.S. 586 (1890).

The Popovici case, supra, was this Court's last pronouncement concerning this jurisdictional exception. However, confusion concerning the extent of the exception has been apparent in the circuits. As Judge Gibbons stated in his dissent in Solomon v. Solomon, 516 F.2d 1018 (3rd Cir.1975), "[T]here is no well-established domestic relations exception....Rather, there is a collection of misstatements of ancient holdings and ill-considered dicta." [at 1030]. One recent law review comment[1] observes:

> The domestic relations exception mandates that federal courts dismiss a domestic relations case, even if it satisfies all of the requirements of the diversity statute, because the court has no power to act. Although the United States Supreme Court originally articulated the domestic relations exception in dicta and no authoritative analysis of its validity exists, federal courts continue to observe a "hands-off" policy in cases requiring an inquiry into a marital or parent-child relationship. The breadth of the exception and the justifications for it remain unclear. In addition, the

[1] Comment, A Proposal for Abolishing the Domestic Relations Exception, 71 Marquette L.Rev. 141 (1987), at 142-143.

> courts' application of the exception remains unpredictable and inconsistent. Within recent years, a growing number of the federal courts have questioned the validity and the contours of the exception. Nevertheless, absent an explicit repudiation of the exception by Congress or the Supreme Court, the lower courts appear to be unwilling to abolish the exception [citations omitted].

As in the instant case, tort claims arising from the acts of family members, and as particularly concerns children, have been the source of many inconsistencies.

The tort claims aspect of the exception has never been addressed by this Court. Several law review articles have pointed out the inconsistent application of this doctrine, and have proposed various resolutions. See Rush, Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective, 60 Notre Dame L.Rev. 1 (1984); Baron, The Evolution of Domestic Relations Cases in Our Federal Courts, 1985 S. Ill. L.J. 353; Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L.J. 571 (March, 1984); Comment, The Domestic Relations Exception to Diversity Jurisdiction, 83 Columbia L.Rev. 1824 (1983); Note, The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation, 24 Boston Col. L.Rev. 661 (1983). All of these commentators would support federal court jurisdiction in this case.

The decision at issue, and the line of Fifth Circuit cases supporting it, are the most extreme of any circuit's, and disregard this Court's observation in Deakins v. Monaghan, 484 U.S. 193, 98 L.Ed.2d 529, 108 S.Ct. 523 (1988):

> This Court has repeatedly stated that federal courts have a "virtually unflagging obligation" to exercise their jurisdiction except in those extraordinary circumstances "where the order to the parties to repair to the State would clearly serve

a countervailing interest." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813, 817, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976), quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-189, 3 L.Ed.2d 1163, 79 S.Ct. 1060 (1959); see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 14-15, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983). [at 484 U.S. 193, 203]

The decisions of the various circuits amply illustrate the conflict with this and other Fifth Circuit cases, including Jagiella v. Jagiella, 647 F.2d 561 (5th Cir.1981), often cited as a leading case.

DISTRICT OF COLUMBIA CIRCUIT

In Bennett v. Bennett, 682 F.2d 1039 (1982), the court denied the application of the exception in a tort claim for custody interference, but applied the exception to injunctive relief.

FOURTH CIRCUIT

The exception has been held inapplicable in tort cases stemming from custody and visitation disputes in Cole v. Cole, 633 F.2d 1083 (1980); Wasserman v. Wasserman, 671 F.2d 832, cert.den. 459 U.S. 1014 (1982); Raftery v. Scott, 756 F.2d 335 (1985).

SIXTH CIRCUIT

In Drewes v. Ilnicki, 863 F.2d 469 (1988), the court reversed a sua sponte dismissal of a father's suit against his wife for intentional infliction of emotional distress arising from her concealment of their child. In reversing the trial court's invocation of the exception, the circuit court held that the exception does not apply to suits that are actually tort claims having only domestic overtones, citing Elam v. Montgomery

County, 573 F.Supp. 797 (S.D. Ohio 1983), and Hooks v. Hooks, 771 F.2d 935 (6th Cir.1985).

SEVENTH CIRCUIT

In Lloyd v. Loeffler, 694 F.2d 489 (1982), the court held the exception inapplicable to a father's tort claim against his ex-wife and her relatives for interference with his custody of a child.

NINTH CIRCUIT

In McIntyre v. McIntyre, 771 F.2d 1316 (1985), the court reversed the dismissal of a father's tort action against former wife and her relatives for violation of his visitation rights under the exception. The court held that the doctrine was inapplicable where 1) questions of status were not involved, 2) there was no interference with pending state court domestic relations proceedings, 3) no alteration of state court judgment is involved, and 4) state court's supervision of a minor was not impinged.

ELEVENTH CIRCUIT

In Ingram v. Hayes, 866 F.2d 368 (1988), the Eleventh Circuit Court of Appeals valiantly attempted to make sense of the various circuits' positions on this exception, but still failed to adequately articulate a predictable approach. The holding, which applied the exception to a tort action for intentional infliction of emotional distress, is similar to that of the Fifth Circuit.

In another district court ruling, Acord v. Parsons, 551 F.Supp. 115 (W.D.Va.1982), where a federal court feared that its adjudication of suit for the tortious interference of a father's custody by his ex-wife, and the resulting emotional distress, would interfere with the state custody case, the court simply stayed the matter pending completion of the state case, rather than dismiss for lack of jurisdiction.

In the instant case, there is no pending state court case. The plaintiffs seek no modification of the custody or visitation decrees in federal court. They seek only damages for torts, which they would be entitled to seek from other third parties who caused these same losses. The simple potential for Jon Richards to reopen his custody case should he win in this federal case is not a legitimate basis for applying the "domestic relations exception." First, Richards' parental rights have been completely terminated by an unappealed judgment. He therefore has no standing to claim custody now, and his case would be quickly dismissed. Second, Defendant Kesler poses no such issue, as she is unrelated to the children.

The District Court makes two "key" findings which cannot reasonably form the basis of jurisdictional law:

> The Court finds that it would become overly involved in the state court's determination of both the abuse and the fitness of Richards as a parent, and therefore must employ the Domestic Relations exception. (P.2, Order and Reasons).

> The Court recognizes that tort issues generally do not fall squarely within the Domestic Relations exception [citations omitted]. However, the state's interest in this matter is apparent. The severity of the juvenile court's order removing Richards [sic] parental rights exhibits the extent of the state's concern for the welfare of these children. (P. 3, Order and Reasons).

These factors have no bearing on jurisdiction. The federal court jury would hear medical and psychological evidence of the abuse, and determine damages. The "fitness" of Richards would not be an issue, except for the obvious observation that a child molester is not a fit parent. Were this a police brutality case, and the defendant previously sentenced to ten

years for the crime in state court, the fact of the "severe" state sentence and the state's concern about police brutality could not possibly impede federal redress. It is also illogical to find that the juvenile court's termination of parental rights supports the application of the exception. In fact, since the termination judgment makes Mr. Richards a legal stranger to the children, the argument that this is not a domestic relations case becomes stronger. "I don't want to get involved" cannot thwart the Congressional grant of jurisdiction in this case.

THE YOUNGER DOCTRINE

The decision below also rests on the doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct.746 (1971). Application of that doctrine here, where there are absolutely no pending state court proceedings, is in direct conflict with this Court's holding in New Orleans Public Service Inc. v. City Council, 109 S.Ct. 2506 (1989). It also violates the separation of powers between the federal courts and Congress, with the court creating its own jurisdictional boundaries. See Brown, When Federalism and Separation of Powers Collide-Rethinking Younger Abstention, 59 George Washington L.Rev 114 (1990); Redish, Judge-Made Abstention and the Fashionable Art of "Democracy Bashing", 40 Case Western L.Rev. 1023 (1990). For the court to simply abstain in this otherwise appropriate and ordinary diversity of citizenship tort action, simply because one defendant is related biologically to the plaintiffs, undoubtedly usurps Congressional authority over federal court jurisdiction.

As it now stands, if suit had been brought only against defendant Kesler, the court would have jurisdiction. Or if Jon Richards had been a stranger, an uncle, a schoolteacher, or a minister, the court would have jurisdiction. Is there any legal sanction for such an illogical interpretation of Congressional intent? There simply is no authority for these children to be deprived of their federal forum solely because they were mo-

lested by their father. It is urged that this writ be granted and thereafter the ruling below be reversed.

RICHARD DUCOTE, ESQ.
COUNSEL FOR CAROL ANKENBRANDT
335-337 DECATUR STREET
NEW ORLEANS, LA 70130
(504)581-5152

APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-3037
Summary Calendar

CAROL ANKENBRANDT, As next friend
and mother suing for L.R. and S.R.,
Plaintiff-Appellant,

VERSUS

JON A. RICHARDS and
DEBRA KESLER,
Defendants-Appellees.

Appeal from the United States District Court For the Eastern District of Louisiana
(89 CV 4244 K)
(May 31, 1991)

Before POLITZ and DAVIS, Circuit Judges.*

PER CURIAM: [1]

The district court correctly declined to exercise jurisdiction over this case by invoking the domestic relations exception to federal jurisdiction and the general abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). See Rogers v. Janzen, 891 F2d 95 (5th Cir. 1989). For the reasons assigned by the district court in its December 10, 1990 order and reasons, we affirm its judgment.

AFFIRMED.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

* This matter is being decided by a quorum. 28 U.S.C. Section 46(d).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

L.R. AND S.R. MINORS WHO SUE THROUGH THEIR NEXT FRIEND AND MOTHER, CAROL ANKENBRANDT	CIVIL ACTION
VERSUS	NO. 89-4244
DEBRA KESLER	SECTION K

ORDER AND REASONS

Defendants, Jon A. Richards and Debra Kesler, filed a motion to dismiss plaintiffs' complaint pursuant to the Domestic Relations Exception and the Abstention Doctrine, which was set for hearing on November 28, 1990. Having reviewed the entire record, the memoranda of counsel, and the law, the Court shall abstain from exercising jurisdiction in this matter and dismiss without prejudice plaintiffs' complaint.

Carol Ankenbrandt brought this complaint on behalf of her minor children, L. R. and S.R., under the diversity jurisdiction of this Court.[1] Plaintiffs allege that the minor children have been abused by their estranged father, Jon A. Richards[2], and his female companion, Debra Kesler, both defendants herein. The plaintiffs argue that Richards, the biological father, has lost his

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[1] The plaintiffs and their mother are residents of the State of Missouri, and the defendants are both residents of the State of Louisiana. Plaintiffs have alleged that the amount in dispute exceeds "$20,000.00" and pray for damages nearing $9.8 million. The Court recognizes that it has jurisdiction over this matter pursuant to 28 U.S.C.§1332 and is a court of proper venue under 28 U.S.C.§1391.

[2] Ankenbrandt and Richards are divorced pursuant to a Louisiana state court judgment. There are allegations before the Court that Richards has been adjudged a danger to the children and has since lost his parental rights to the children.

parental rights pursuant to a state court judgement and is no more than a tortfeasor in this action. The plaintiffs also point out that the state court decree is final, as no appeal was taken and delays have run. Thus, the plaintiffs take the position that this action is one sounding only in tort, separate and distinct from any domestic dispute.

Defendants urge the Court to dismiss this action since the allegations of abuse are an integral part of the ongoing domestic jurisdiction of the state court.

DOMESTIC RELATIONS EXCEPTION

The federal courts have for a century recognized that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." Ex parte Burrus, 136 U.S. 586, 594, 10 S.Ct. 850, 853 (1890). The Domestic Exception is founded on the this state interest in domestic matters, as well as to avoid the possibility of conflicting state and federal decrees in matters under the state's continuing jurisdiction and to avoid the unnecessary cluttering of federal dockets. Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978). Considering these factors, the Court finds that it would become overly involved in the state court's determination of both the abuse and the fitness of Richards as a parent, and must therefore employ the Domestic Relations Exception. Goins v. Goins, 777 F.2d 1059, 1061 (5th Cir. 1985); Cf. Wright & Miller, Federal Practice and Procedure, Jurisdiction 2d § 3609 (1984).

The Court recognizes that tort issues generally do not fall squarely within the Domestic Relations Exception. e.g. Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982); Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982). However, the state's interest in this matter is apparent. The severity of the juvenile court's order removing Richards parental rights exhibits the extent of the state's concern for the welfare of these children.

In accepting jurisdiction over this matter, this Court

would be forced to re-evaluate the same evidence heard by the state court and re-determine the issue of abuse based on the same evidence already "presented to and addressed in the state court proceedings." Short v. Short, 730 F.Supp. 1037, 1040 (D. Col. 1990). The state court heard testimony on at least three separate days prior to finding Richards unfit to be a parent.[3] The fact that Richards was a parent to the children would necessarily be placed before the fact finder in this tribunal. This Court would be forced to review the relationship between parent and child, an area within the particular jurisdiction and authority of the state court, and which has already been the subject of its scrutiny. Ex parte Burrus, 136 U.S. at 594, 10 S.Ct. at 853; see also Jagiella v. Jagiella, 647 F.2d 561, 565 (5th Cir. 1981). This Court is not willing to review this evidence when such review would carry with it the risk of infringing on the peculiar state court interest in this matter and in the welfare of the children.[4]

The ongoing jurisdiction of the state court over its judgements[5] in such matters prompts this Court to adopt the Domestic Relations exception and decline to exercise jurisdiction over the instant matter. Short, 730 F.Supp. at 1040; Brown v. Hammond, 747 F.2d 320 (5th Cir. 1984).

In addition to the Domestic Relations Exception, the defendants raise in their motion the general abstention doctrine under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971).

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[3] This is evidenced by the sealed exhibits attached to plaintiff's opposition to the motion to dismiss.

[4] The prospects of a jury finding a different result than that found by the state court, would invite Richards to request the reconsideration of his parental status. This request, no matter the likelihood of its success, would most definitely fall to the state court. Accord Rogers v. Janzen, 891 F.2d 95, 98 (5th Cir. 1989); Rykers v. Alford, 832 F.2d 895 (5th Cir. 1987).

[5] While this appears to be true, the state court will always retain jurisdiction to enforce or alter its decrees. See Casida v. Casida, 580 F.Supp. 857, 859 (D. Col. 1984).

"Abstention, that doctrine designed to promote federal-state comity, is required when to render a decision would disrupt the establishment of a coherent state policy." Zaubi v. Hoejme, 530 F.Supp. 831, 836 (W.D. Pa. 1980) (citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976).

The Court has already examined the state court interest in the ongoing welfare of the minor plaintiffs. The conduct complained of herein is an integral part of the domestic matters presented to the state court, and is the impetus for the rulings of that court. The possibility of conflicting findings in this Court violates the basic principals of comity and compels this Court to apply its discretion declining the exercise of jurisdiction in the instant matter. Accordingly,

IT IS ORDERED that the Motion to Dismiss filed by defendants, Jon A. Richards and Debra Kesler, be and is hereby GRANTED;

IT IS FURTHER ORDERED that plaintiffs' complaint be and is hereby DISMISSED WITHOUT PREJUDICE.

New Orleans, Louisiana, this 10th day of December, 1990.

[S] George Arcenaux
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

L.R. AND S.R., MINORS WHO SUE THROUGH THEIR NEXT FRIEND AND MOTHER, CAROL ANKENBRANCT,	CIVIL ACTION NO. 89-4244
Plaintiffs,	SEC. _____
vs.	MAG. SECT. K MAG.1
JON A. RICHARDS AND DEBRA KESLER,	JURY TRIAL
Defendants.	

****

COMPLAINT FOR DAMAGES

COME NOW the Plaintiffs, L.R. and S.R., minors who sue through their next friend and mother, Carol Ankenbranct, and for their complaint against Defendants, Jon A. Richards and Debra Kesler, allege and state as follows:

JURISDICTION

1) This action is a tort claim for damages exceeding $20,000.00 exclusive of interest and costs. Jurisdiction is based on diversity of citizenship, 28 U.S.C. §1332 and 1391(a).

COMMON ALLEGATIONS

2) Carol Ankenbranct and Jon A. Richards were

married and are the parents of L.R., a female child born on September 18, 1982, and S.R., a female child born on December 13, 1984. Carol Ankenbranct and John A. Richards are now divorced. Carol Ankenbranct has been awarded full custody of both children. Defendant Richard's parental rights have been terminated by the Jefferson Parish Juvenile Court, pursuant to LSA-R.S. 13:1601-1605.

3) Defendant Jon A. Richards is a citizen of the State of Louisiana and is domiciled in Orleans Parish within this district. Defendant Debra Kesler is also a citizen of the State of Louisiana, domiciled in Jefferson Parish within this district.

4) Carol Ankenbranct and the Plaintiff minor children are citizens of the State of Missouri, domiciled therein.

DEFENDANTS RICHARDS AND KESLER

5) The children L.R. and S.R. have been repeatedly sexually abused and battered by Defendants Richards and Kesler, acting in concert, commencing on or about October of 1988 until on or about January, 1989. The sexual abuse has consisted of repeated acts of sexual fondling of the children's genitals, sexual penetration by some unknown object, including repeated acts of vaginal, oral, and anal intercourse. Further, the Defendants repeatedly chained the children Plaintiffs to boards and forced them to pose for pornographic pictures.

6) As a result of the sexual abuse, the children have experienced severe and permanent physical, psychological, emotional and sexual damage for which they are entitled to compensatory relief.

7) Further, in an effort to coerce all the Plaintiff children into remaining silent about the abuse, Defendants Richards and Kesler threatened the children with acts of bodily harm to maintain their silence.

8) Further, on December 23, 1988, Defendant Kesler, in her capacity as a licensed attorney, attempted to persuade Judge Robin Giarrusso, of the Civil District Court for Orleans Parish, to grant Defendant Richards additional visitation with the children in order to commit further abuse, misrepresenting her interest to the court as a "neutral friend".

DAMAGES

9) Said Plaintiff minor children are entitled to full compensatory damages from both Defendants, jointly and in solido, for their past, present and future treatment which will be required as a result of the abuse they have suffered, and for their physical, psychological, emotional, mental and sexual damage. As the proximate and direct result of the Defendants' tortious conduct, set forth herein, each Plaintiff has suffered the following damages:

A)	Physical, emotional, and psychological pain and suffering, past and future	$ 6,000,000.00
B)	Humiliation and embarrassment	$ 1,000,000.00
C)	Past and future psychological care	$ 800,000.00
D)	Damage to sexuality	$ 2,000,000.00
	TOTAL	$ 9,800,000.00

JURY TRIAL

10) Plaintiffs demand a jury trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against the Defendants as set forth above, plus interest, costs and attorneys fees, and all other equitable relief as is deemed reasonable and just.

Respectfully submitted,

DUCOTE & FOSTER
Suite 2030 - Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
(504) 523-6951

By: [S]_____
Richard Ducote, Esq.
Bar Roll No. 5111

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

L.R. and S.R., MINORS WHO SUE THROUGH THEIR NEXT FRIEND AND MOTHER CAROL ANKENBRANDT, PLAINTIFFS	CIVIL ACTION NO. 89-4244 SEC. K MAG. 1
VS.	
JON A. RICHARDS AND DEBRA KESLER,. DEFENDANTS	JURY TRIAL

****

MOTION TO AMEND COMPLAINT FOR DAMAGES

Plaintiffs L.R. and S.R., through the undersigned counsel, move to amend their Complaint for Damages as follows:

I.

The name "Carol Ankenbranct" is amended to real "Carol Ankenbrandt" in all places in the Complaint, including the caption.

II.

In Paragraph 2, the name "John A. Richards" is amended to read "Jon A. Richards."

III.

In Paragraph 5, the first sentence is amended to read "The children L.R. and S.R. have been repeatedly sexually abused and battered by Defendants Richards and Kesler, acting in concert, commencing on or about January, 1988, and continuing until on or about January, 1989, on such dates that Jon A. Richards had the children in his care for visitation, although Carol Ankenbrandt

did not learn of said abuse until October, 1988." The remainder of Paragraph 5 remains unchanged.

IV.

All other allegations contained in the Complaint for Damages are reurged herein in extenso.

WHEREFORE, IT IS MOVED that this motion be granted and the Complaint for Damages be amended as set forth above.

[S]_____
RICHARD DUCOTE (#5111)
COUNSEL FOR PLAINTIFFS
8531 SYCAMORE PLACE
NEW ORLEANS, LA 70118-1521
(504) 523-6951

ORDER

IT IS HEREBY ORDERED that the motion be granted and the Complaint for Damages be amended as moved.

New Orleans, Louisiana, this 29th day of May, 1990.

[S]_____
DISTRICT COURT JUDGE

STATE OF LOUISIANA
IN THE INTEREST OF
LOVELIE RICHARDS
W/F DOB 09/18/82
STEPHANIE RICHARDS
W/F DOB 12/13/84

FILED FEB. 27, 1989

JUVENILE COURT
PARISH OF JEFFERSON

STATE OF LOUISIANA

SECTION _____

_____
Deputy Clerk

PETITION

CHILD(REN) IN NEED OF CARE

To the Honorable, the Juvenile Court for the Parish of Jefferson, State of Louisiana:

The petition of JOHN M. MAMOULIDES, DISTRICT ATTORNEY who, upon information and belief, with respect represents that:

LOVELIE & STEPHANIE RICHARDS

whose parents are Jon Anthony Richards, whose residence is 710 Burdette, Apt. D., New Orleans, La., and Carol Richards, whose residence is 2508 Elizabeth, Metairie, La., but who are in the custody or care of their mother, and are within the jurisdiction of the Juvenile Court for the Parish of Jefferson, State of Louisiana, in that:

LOVELIE & STEPHANIE RICHARDS

are CHILDREN IN NEED OF CARE as to Jon Anthony Richards, for the following reason, to-wit:

I.

Lovelie and Stephanie Richards have been physically abused and sexually fondled by their father on many occasions particularly in October, November and December, 1988 as well as in January, 1989, all as found in violation of CJP Art. 13:14(A).

Jon Anthony Richards has neglected proper supervision of these children allowing them to see sexual acts between him and his girlfriend, affecting the children emotionally, all as found in violation of CJP Art. 13:14 (B).

II.

Jurisdiction of this Honorable Court arises under Code of Juvenile Procedure Articles 13:14 (A) (B) (C) and 15(C).

Petitioner shows that a preliminary inquiry has been made by an officer of this Court and it now appears that the interest of the public and child(ren) require that further action be taken.

WHEREFORE, the premises considered, petitioner prays that formal jurisdiction be taken by this Honorable Court and that this matter be adjudicated and that the Court render such judgments and orders as the Court may deem just, proper and necessary for the safety and protection of the public and for the welfare of the said children, and find that Lovelie & Stephanie Richards are children in need of care.

JOHN M. MAMOULIDES
BY: [S] _____
Assistant District Attorney

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared: _____, who, being first duly sworn, did depose and say:

That he is the petitioner in the above and foregoing petition, that he has read and signed said petition; and that all of the contents thereof are true and correct to the best of his information, knowledge and belief.

[S] _____
Assistant District Attorney

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 24TH DAY
OF FEBRUARY, 1989

THIS MATTER IS SET FOR
THE 13TH DAY OF MARCH,
1989, AT 9:00 O'CLOCK A.M.

[S] _____
Notary Public

ITEM NO. OCS LETTER

DPR

DOCKET NO. 89-CC-29

JUVENILE COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA
SECTION "B"

NO. 1989 CC 00029

IN THE INTEREST OF LORELEI RICHARDS AND
STEPHANIE RICHARDS

FILED: AUG. 9, 1989 [S] _____
DEPUTY CLERK

JUDGMENT ADJUDICATING CHILD IN NEED OF CARE

This case was tried on May 12, 1989, May 19, 1989, and May 26, 1989.

PRESENT: ADA J. VERERICA, Assistant District Attorney, Co-counsel for Lorelei and Stephanie Richards

RICHARD DUCOTE,
Attorney for Lorelei Richards and
Stephanie Richards

JON ANTHONY RICHARDS

CAROL ANN ANKENBRANDT RICHARDS

ELLEN WIDEN KESSLER,
Attorney for Carol Ann Ankenbrandt Richards

BERNARD M. PLAIA, JR., Attorney for
Jon A. Richards

Based upon the testimony of the witnesses, the exhibits and the evidence, the law, and the facts,

IT IS ORDERED, ADJUDGED AND DECREED that Lorelei Richards and Stephanie Richards are hereby adjudicated to be in need of care as to Jon A. Richards, the biological father.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that absolute and full legal custody of the said minor children is awarded to Carol Ann Ankenbrandt Richards, the mother of Lorelei Richards and Stephanie Richards.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Jon A. Richards shall have no visitation of any kind with such children and shall have no contact whatsoever or of any kind with such minor children and/or with Carol Ann Ankenbrandt Richards, whether directly or indirectly, through any person or agent of Jon A. Richards, including any member of his family.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Jon A. Richards shall not harass or interfere with, directly or indirectly, the custody or control of the said minor children and shall not allow, sponsor, or countenance any contact, whether directly or indirectly, with the children, their mother, their schools, or in any other manner.

JUDGMENT READ AND RENDERED on May 26, 1989.

JUDGMENT SIGNED, in Gretna, Louisiana, this 9th day of August, 1989.

[S] _____
THOMAS P. MCGEE
JUDGE

JUVENILE COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA
SECTION "B"

NO. 1989 TP 00003

IN THE INTEREST OF LORELEI RICHARDS AND
STEPHANIE RICHARDS

FILED: AUG. 9, 1989 [S] _____
DEPUTY CLERK

JUDGMENT OF TERMINATION OF PARENTAL RIGHTS

This case came for hearing on August 9, 1989.

PRESENT: ADA J. VERERICA, Assistant District Attorney for the Parish of Jefferson

BERNARD M. PLAIA, JR., Attorney for/and Jon A. Richards

CAROL ANN ANKENBRANDT RICHARDS

RICHARD DUCOTE, Attorney for Lorelei and Stephanie Richards

Upon consideration of the facts of the case, the law, and the evidence,

IT IS ORDERED, ADJUDGED AND DECREED that all parental rights and privileges of Jon A. Richards as to Lorelei Richards and Stephanie Richards, be and hereby are terminated finally and unalterably on the grounds that the said children have been abused by Jon A. Richards' grossly negligent behavior, consisting of persistent cruel and inhuman treatment which is below any reasonable standard of human decency, and that Jon

A. Richards is unfit to retain parental control and there is no reasonable expectation of his reformation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Jon A. Richards shall not in the future contact, either directly or indirectly through any other person, the said Lorelei Richards and Stephanie Richards, and shall not communicate or cause any communications with them, either directly or indirectly.

JUDGMENT READ, RENDERED AND SIGNED, in Gretna, Louisiana, this 9th day of August, 1989.

[S] _____
THOMAS P. MCGEE
JUDGE

(2)

NO: 91-367

Supreme Court, U.S.
FILED
NOV 22 1991
OFFICE OF THE CLERK

IN

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CAROL ANKENBRANDT,
AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,
PLAINTIFF, APPELLANT, PETITIONER

VS.

JON A. RICHARDS AND DEBRA KESLER,
DEFENDANTS, APPELLEES, RESPONDENTS

JOINT RESPONSE OF JON A. RICHARDS AND DEBRA KESLER, IN OPPOSITION, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF COURT OF APPEAL FOR THE FIFTH CIRCUIT

SAMUEL S. DALTON
ATTORNEY FOR
DEBRA KESLER,
RESPONDENT
P.O. BOX 10501
JEFFERSON, LA
70181-0501
(504) 835-4289

PAUL WEIDENFELD
ATTORNEY FOR
JON A. RICHARDS,
RESPONDENT
144 ELK PLACE
NEW ORLEANS, LA
70112
(504) 525-1586

QUESTION PRESENTED FOR REVIEW

DID THE DISTRICT COURT PROPERLY APPLY AND APPLY THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION AND THE ABSTENTION DOCTRINE MANIFESTED BY YOUNGER V. HARRIS, 401 U.S. 37, 91 S.CT. 746 (1971) WHEREIN IN ORDER TO TREAT THE COMPLAINT, THE DISTRICT COURT WOULD HAVE TO ACT AS A COURT OF REVIEW FOR THE STATE PROCEEDINGS AND RE-VISIT, RE-EVALUATE, RE-EXAMINE EVIDENCE CONCERNING A DOMESTIC SITUATION AND CIRCUMSTANCES, AND ACT AS A COURT OF REVIEW CONCERNING THE RELATIONSHIP BETWEEN PARENT AND CHILD THEREBY RISKING A CONFLICTING RESULT AND VIOLATE THE FUNDAMENTAL PRINCIPLES OF COMITY.

PARTIES TO HIS PROCEEDINGS

PLAINTIFFS::

Carol Ankenbrandt

Lorelei Richards, her minor daughter

Stephanie Richards, her minor daughter

DEFENDANTS:

Jon A. Richards

Debra Kesler

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DECISION BELOW

TRIAL COURT:

ANKENBRANDT V. RICHARDS, NO. 89-4244, United States District Court, Eastern District of Louisiana, Judgment rendered on December 10, 1990. Not reported in F.Supp. (1990 WL 211545 {E.D. of LA.}). See Petitioners' Appendix, A-3 to A-6.

ON APPEAL:

ankenbrandt v. richards, No. 91-3037, United States Court of Appeals for the Fifth Circuit, District Court Judgment affirmed on May 31, 1991). Not Published under Local Rule 47.5. See Petitioners Appendix, A-2.

JURISDICTION

Jurisdiction is vested in this Honorable Court by virtue of and pursuant to 28 U.S.C. Sec. 1254(1), Sec. 2101(c). The opinion of the Fifth Circuit Court of Appeals, in this matter, on May 31, 1991. See Petitioners Appendix, A-2. No rehearing was sought by Petitidner.

RELEVANT PREMISES

1) THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION.

2) THE ABSTENTION DOCTRINE, COMITY, AS SET OUT BY YOUNGER V. HARRIS, 401 U.S. 37, 91 S.CT. 746 (1971).

STATUTE INVOLVED

28 U.S.C. SEC. 1331
((DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS)

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between
>
> > (1) citizens of different states;
> >
> > ....

STATEMENT OF THE THE CASE

This action was filed on September 26, 1989, with Jurisdiction based on diversity of citizenship. Defendant, Kesler, answered on November 6, 1989, denying, specifically, each and every allegation of the complaint. Defendant, Richards, answered on February 13, 1990, denying, specifically, each and every allegations of the complaint. Kesler and Richards challenged the subject matter jurisdiction in their answers. An amended complaint was filed on May 25, 1990, amending dates. On October 29, the defendants, Kesler and Richards, jointly, filed a Motion To Dismiss, concerning: The Domestic Relations Exception and the Abstention Doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). Plaintiffs, L.R. and S.R. filed an opposition on November 16, 1990. The matter was decided, without oral argument, on the

written Memorandums submitted, by both, the Plaintiff and the Defendants. The Honorable George Arceneaux, District Judge, Presiding, granted the Motion and Dismissed the Complaint, without prejudice. Written reasons were assigned. Judgment of Dismissal was entered on December 10, 1990 (See Plaintiffs' Appendix, A-3 thru A-6).

Plaintiffs timely noticed an appeal, on January 8, 1991, to the United States Fifth Circuit Court of Appeals. On May 31, 1991, the Fifth Circuit affirmed the judgment in a per curiam opinion (See Plaintiffs' Appendix, A-2).

REASONS FOR DENYING THE APPLICATION

Petitioners request this Honorable Court to grant a Writ of Certiorari premised upon the following:

1) This decision in conflict with other decisions of various circuit courts of appeal on the same matter; and,

2) The decision of the District Court and its affirmance by the Fifth Circuit Court of Appeals represents an important question of Federal Law which has not been, but should be, decided by this Court.

For the reasons and premises cited below this supposed controversy does not merit the attention or review by this Honorable Court and the Petition for Writ of Certiorari should and ought to be dismissed, forthwith.

First, it is necessary to clear up either a misconception possessed by the Petitioners' Attorney or an attempt to

mislead this Honorable Court, when he states in his application on page 6, last paragraph thereof, to-wit:

> "The federal court jury would hear medical and psychological evidence of the abuse, and determine damages. The 'fitness' of Richards would not be an issue, except for the obvious observation that a child molester is not a fit parent."

No one is entitled to that observation, without full proof in these proceedings.

In fact and truth the Federal District Court would review the issues and factors and evidence presented to the State Courts, including but not limited to Richards' fitness as a parent and the injustice that has been imposed upon him. Evidence of how far a vindictive wife can go in punishing her husband because he has fallen in love with a younger woman, will be relevant and pertinent. There is no res adjucata or collateral estoppel here, as to any of the

issues or facts. Defendant, Richards is going to win this one because of the simple reason Richards can defend himself, now; something he could not do in the State Juvenile Court. At that time, he was facing Criminal Charges, in two prosecutorial jurisdictions, and upon advice of his attorney did not attempt to present an affirmative defense, intelligently reserving such defense to defeat charges which could have resulted in his imprisonment for a long, long time. These charges are no longer a consideration, such charges turned out to be frivolous and without cause. Richards, being unfettered, will, in these proceedings, demand that his fitness as a parent be examined and the injustice imposed upon him be offset, thereby.

Second, on page 7, last paragraph, thereof, Petitioners state, to-wit:

> "...if suit had been brought only against defendant Kesler, the court would have jurisdiction."

In fact and truth if suit had been brought only against Kesler, Plaintiffs' Attorney knows better than anyone the suit would have been dismissed for being frivolous and he would have been sanctioned. Kesler is in this suit for one reason and one reason, only, and that is so Plaintiff's Attorney, whose was the same attorney who appeared for the Plaintiff in Rogers v. Janzen, 891 F2d 95 (5th Cir. 1989), was afraid that the contrived "State Border" would not defeat the "Domestic Relations Exception" and needed a non-immune co-defendant so he could make the statement referred to above.

Now turning to the so-called conflict between the circuits, Respondents point out that none of the cases cited by Petitioner establishes a conflict. No case cited by

the Petitioners places the Federal Courts in the position of having to sit as a Court of Review or Appeal and grant a "Trial De Novo" concerning state court adjudications.

A simple reading of the cases establish the tort complained of occurred after and independent of the domestic proceedings or did not involve elements of comity. Nothing cited to this Honorable Court establishes a true conflict. At best, different approaches are suggested. Each circuit, presented with the peculiar facts of the other circuit, would, more likely than not, arrive as the same result. No case cited by Petitioners involve an obviously contrived State Border, in an attempt to secure Federal Jurisdiction in an otherwise totally State Domestic situation.

FEDERAL COURTS OUGHT NOT TO BE IN THE BUSINESS OF PROVIDING A FORUM FOR A TRIAL "DE NOVO" OF STATE PROCEEDINGS

There can be no question that the District Court was correct in recognizing that it would be providing a "Trial De Novo" Court for the State Court. Not only that, but comity and the Younger Doctrine has to be recognized as a valid use of the Court's discretion and good sense, in this matter.

The District Court applied the Law and the Jurisprudence correctly and properly, as affirmed by the Fifth Circuit Court of Appeals, when:

a) It applied the Domestic Relations Exception and dismissed the complaint. Ex Parte Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890); Jagiellia v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1985); and,

b) It applied the concept of Comity Abstention Doctrine manifested in Younger v. Harris, 401 U.S. 37, 91 s.Ct. 746 (1971).

The complaint, concerned herein, was filed as a tort suit, in diversity, naming Debra Kesler and Jon A. Richards as Defendants. Said complaint contains allegations of child abuse, raised for the first time, after eight years of marriage, in a domestic custody fight. Such allegations were treated in the Louisiana divorce Proceedings and Proceedings in the Juvenile court system, State of Louisiana. Carol Ankenbrandt presently has custody of L.R. and S.R.. Jon Richards' parental rights have been terminated by a decree of the Juvenile Court, Parish of Jefferson, State of Louisiana (See Petitioners' Appendix A-18 & A-19). The State's Court's litigation has been adjudicated, on these issues. It is true that Richards did not

affirmatively defend himself in these proceedings. The Judgment of Termination of Parental Rights was not Appealed by Richards. It is also true that it was not affirmatively defended and wasn't appealed because two Prosecutorial Jurisdictions were considering criminal charges, calling for substantial imprisonment, against him, during the time of the Juvenile Proceedings. His legal advice was not to disclose his defense but reserve it to fight the felonies. The Jaws of this Prosecutor's vise is a standard technique, used by Prosecutors, and had the desired effect of prohibiting Richards from presenting an affirmative defense in the Juvenile Proceedings, since the Juvenile Court would not stay its proceedings, to allow the criminal charges to be disposed of; why this is so, offends any fair minded and decent lawyer; nevertheless, this

Prosecutors' "Left Handed Blackmail" does wonders for prosecutors.

Richards was in the Jaws of a Prosecutorial Oppressive Vise. He could not defend himself in the Juvenile Proceedings for fear of disclosing evidence of the defense which could keep him from being imprisoned on the threatened felony charges, placing Richards in a "HOBSON'S CHOICE": lose the Juvenile Proceedings and successfully defend the Felonies or Win the Juvenile Proceedings and subject his Felony Defenses to the sabotage of subsequent falsehoods by his accuser, the vindictive wife, such as re-arranging dates, altering descriptions of events and adding new allegations. When the State was called upon to "put up" on the Felony charges, it could not produce, because it knew what Richards did not know; the State was in possession of evidence which vindicated Richards of

any abuse charges. The State had been misbehaving the whole time. In fact and truth, the State actually had, in its possession, evidence, during the Juvenile Proceedings which would have cleared Richards. So, the Juvenile Proceedings are going to be set aside, after this litigation is disposed of, one way or the other. How do we know this to be true? Richards is here, answering this suit and responding to this Application, with no convictions for child abuse or otherwise; if this were not true, the Petition would have alleged his convictions and no money would have been spent for printing this response, Richards would be "<u>under the Jail</u>".

<u>RE: THE STATE'S INTEREST</u>

Now, nothing could be more involved in domestic relations than:

1) A divorce; and,

2) A custody battle where charges of sexual abuse, hurled by wife, against the husband and father, for the very first time, upon visitation during the separation, after eight (8) years of marriage; and,

3) The new girlfriend and present wife is alleged to be involved.

During the course of the Domestic situation surrounding Carol Ankenbrandt, Jon Richards, L.R. and S.R., they were involved in litigation in several state courts and agencies, to-wit:

a) State Courts:

1) Civil District Court, Parish of Orleans, State of Louisiana; separation, divorce and child custody; and,

2) Juvenile court, Parish of Jefferson, State of Louisiana; Child in need of care proceedings; an action to terminate parental rights of Jon A. Richards and Custody of the children; and,

3) Fourth Circuit Court of Appeal; and,

4) Fifth Circuit Court of Appeal; and,

5) Louisiana Supreme Court.

b) State and Parish Agencies:

1) District Attorney's Office, Parish of Orleans, Louisiana; and,

2) District Attorney's Office, Parish of Jefferson, Louisiana; and,

3) New Orleans Police Department Investigation of Child Abuse; and,

4) Jefferson Parish Sheriff's Office, Investigation of child abuse; and,

5) Office of Community services, Child Sexual Abuse Unit; this entity is a State arm of the Child Protection services, represents the State before the Juvenile Court and it is required by State Statute to perform its own investigation of allegation of abuse.

Sometime during the course of the events, in the Domestic Situation, Carol Ankenbrandt, with the children, place a State Border between herself and the Louisiana Domestic Situation. Relying on

that Border brought this Diversity Action, sounding in tort.

In the words of the Fifth Circuit, affirming the District Court's decision to abstain in Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1989), stating the Abstention Doctrine is applicable, in such a situation and the District Court properly applied the Doctrine, to-wit:

"..., its resolution would require the type of inquiry into the parent-child relationship that is better conducted by State Courts. At the heart of Rogers' suit is the allegations that Gray was sexually abused their daughter, an allegation that was considered by the Juvenile Court in awarding custody and Rogers visitation rights. (Citing La. Civ. Code Ann. Art. 147 [West Supp. 1989]). In order to supply the requested relief, a federal district court would be required to revisit the factual determination made prior to awarding custody, and if it reached a contrary conclusion to unsettle the basis of the custody and visitation decision. . . in the end, such a result would no doubt prompt a suit by Rogers for custody and visitation reconsideration. . . thereby encroaching on the apparent state interest

in determining custody and risking incompatible federal and state decrees. (Citing Rykers v. Alford, 832 F.2d at 899-90)."
Rogers v. Janzen, 891 F.2d 95 (5th Cir. 1989).

The District Court Judge, the Honorable George Arceneaux, did in his "Order and Reasons", in this matter, correctly recognized the Domestic Relations Exception was applicable, to-wit:

> "The Federal Courts have for a century recognized 'that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State and not to the laws of the United States.' Ex parte Burrus, 136 U.S. 586, 594, 10 S.Ct. 850, 853 (1890). The domestic exception is founded on this state interest in domestic matters, as well as to avoid the possibility of conflict in state and federal decrees in matters under the state continuing jurisdiction and to avoid the unnecessary cluttering of the Federal dockets. Couch v. Couch, 566 F.2d 486,487 (5th Cir. 1978)." See Order and Reasons, Petitioners' Appendix, A-4.

In Jagiella v. Jagiella, 647 F.2d 561 (5th cir. Unit B, 1981) the Court cited, with approval, the language from Bacon v. Bacon, 365 F. Supp. 1019 (D. Ore. 1973), to-wit:

> "Stripped of its verbiage, this is no more-than-no less-than a domestic relations case. While it may true, as Plaintiff's counsel has urged, that there are instances where estranged parties may properly sue each other in Federal Court, this is not one. . . . The language of the complaint shows this to be part of an on going series of disputes centering around a dissolved but still stormy relationship and the status of and harm to their children.
> . . . . [I]f this case were allowed to be maintained, United States District Courts would be deluged with domestic relations cases, all containing initially colorable tort claims of 'extreme and outrageous conduct resulting in severe emotional distress' where the parties have placed [a state border] between themselves in an attempt to escape each other.
> For this and other policy reasons, a judicial exception to Federal Jurisdiction as been created with respect to intrafamily feuds." 365 F.Supp. 1020.

It becomes readily apparent that Federal District Courts are not going to ignore the fact that State Courts are more tuned to and competent to treat this type of litigation than Federal Courts and when the risk of interference between the State and Federal Court Systems, and the possibility of contradictory and overlapping rulings are considered, it becomes sensible that the Abstention Doctrine be invoked. Goins v. Goins, 777 F.2d 1059 (5th Cir. 1983).

The Federal District Court for the District of Colorado, in Short v. Short, 730 F.Supp. 1037 (D. Colo. 1990), cites Rogers v. Janzen, 891 F.2d 95, 97-99 (5th cir. 1989) for the following premise, to-wit:

> "Because plaintiffs' claim would necessitate a re-evaluation of issues and evidence properly presented and addressed in the State Court proceedings, this suit clearly falls within the domestic relations exception to Federal Jurisdiction." Short v. Short, 730 F.Supp 1037 (D. Col, 2/9/90).

AND,

> "as in Bacon, here appellant's allegations regarding the alienation of his children's affection grow out of the 'dissolved but still stormy relations of the parties', The District court therefore acted correctly in dismissing the counterclaim." Jagiella v. Jagiella, 647 F.2d 561 at 565.

Footnote 4 of the District Court's Order and Reasons, hits the nail on the head, in regard to Plaintiff's contention that the State's interest is at an end, to-wit:

> "The prospects of the jury finding a different result than that found by the state court, would invite Richards to request the reconsideration of his parental status. This request, no matter the likelihood of its success, would most definitely fall to the state court. Accord Rogers v. Janzen, 891 F.2d 95, 98 (5thCir. 1989); Rykers v. Alford, 832 F.2d 895 (5th Cir. 1987)." See Petitioners' Appendix, A-5, footnote 4.

As long as water runs downhill and grass is green the state court will be involved in this matter, in the future, until there is a re-instatement of the Parental rights to Richards.

RE: YOUNGER V. HARRIS

The District Court, also took notice, as did the Fifth Circuit Court of Appeals, of the Abstention Doctrine as manifested by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971) recognizing acceptance of jurisdiction, in this matter, would violate fundamental principles of comity and such

principles compel the court to decline to exercise jurisdiction, to-wit:

> "In addition to the Domestic Relations Exception, the defendants raise in their motion the general abstention doctrine under Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971). Abstention, that doctrine designed to promote federal-state comity, is required when to render a decision would disrupt the establishment of a coherent state policy.' Zaubi v. Hoejme, 530 F.Supp. 831, 836 (W.D. Pa. 1980) (Citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976). See Petitioners Appendix, A-6.

As was said in Casida v. Casida, 580 F.Supp. 857 (d. Col. 1984), to-wit:

> "It is painfully apparent from a reading of the complaint that the dispute between the parties, no matter how labeled, is essentially one arising with respect to the provisions of a . . . custody agreement, visitation rights and other incidents of a matrimonial dispute."

CONCLUSION

In view of the premises recited hereinabove this Honorable Court should and ought to deny review of the Petition for Certiorari and dismiss same, forthwith.

SAMUEL S. DALTON
ATTORNEY FOR
DEBRA KESLER,
RESPONDENT
P.O. BOX 10501
JEFFERSON, LA
70181-0501
(504) 835-4289

PAUL WEIDENFELD
ATTORNEY FOR
JON A. RICHARDS,
RESPONDENT
144 ELK PLACE
NEW ORLEANS, LA
70112
(504) 525-1586

(3)

No. 91-367

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CAROL ANKENBRANDT,

Petitioner,

—v.—

JON A. RICHARDS and
DEBRA KESLER,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

Marcia Robinson Lowry
(*Counsel of Record*)
Robin L. Dahlberg
Children's Rights Project
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Steven R. Shapiro
John A. Powell
Eileen B. Hershenov
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the protection of individual rights and to the availability of the federal courts for the vindication of those rights.

The jurisdictional issues presented by this case are of particular concern to the ACLU's Children's Rights Project, which has litigated numerous statutory and constitutional claims on behalf of children in federal courts throughout the country.

STATEMENT OF THE CASE

Petitioner Carol Ankenbrandt brought this tort action against her former husband and his female companion on behalf of her two minor daughters in the District Court for the Eastern District of Louisiana in September 1989 seeking money damages for the alleged sexual abuse of her children. Pet.Cert. at 1. Ankenbrandt is a Missouri citizen; respondents Jon A. Richards, the children's father, and Debra Kesler, are citizens of Louisiana. The complaint was brought under the diversity jurisdiction of the district court.

In August 1989, a month before the tort suit was initiated, the Jefferson Parish, Louisiana, Juvenile Court entered a judgment pursuant to state law terminating all of Richards' parental rights on the grounds of abuse and permanently enjoining him from any contact with the children. *Id.* Richards did not defend himself against the allegations in the juvenile court proceedings and did not appeal the decision. The time for any appeal has

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

now run.[2]

On December 10, 1990, the district court granted defendants' motion to dismiss, citing a domestic relations exception to federal court jurisdiction and the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). *Ankenbrandt v. Richards*, No. 89-4244, 1990 U.S. Dist. LEXIS 17068 (E.D. La Dec. 10, 1990). The Fifth Circuit affirmed without opinion. 934 F.2d 1262 (5th Cir. 1991). This Court granted Ankenbrandt's petition for *certiorari* on January 10, 1992, limited to the following questions:

1) Is there a domestic relations exception to federal jurisdiction?

2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages?

3) Did the District Court in this case err in abstaining from exercising jurisdiction under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971)?

SUMMARY OF ARGUMENT

This case raises important issues about the scope of federal jurisdiction and the authority of federal courts to create expansive exceptions to the statutory jurisdiction that Congress has conferred. We are mindful, of course, of the controversy that has swirled around diversity jurisdiction. Nevertheless, we believe that any alterations in that jurisdiction must be made by Congress and not by judicial reinterpretation of a domestic relations exception

[2] Richards has since claimed that, on the advice of counsel, he chose neither to defend himself against the allegations of abuse in the divorce and juvenile proceedings, nor to appeal the termination of his parental rights, because he was told that to do so would have prejudiced his defense against then-pending felony charges. Apparently those criminal charges were later dropped. Op.Cert. at 10-11.

that has never rested on a firm doctrinal foundation.

Given our limited role as *amicus curiae*, this brief does not address whether a domestic relations exception should ever be recognized in federal diversity cases, other than to note that the historical argument in favor of such an exception has been widely criticized. Assuming that such an exception exists, it was error to apply it to the facts of this case.

The commonly offered rationale for a domestic relations exception is that federal courts should refrain from adjudicating "core" or "primary" issues of state domestic relations law for reasons of both competence and comity. At the same time, the federal courts have always been cognizant of their obligation to exercise the jurisdiction that Congress has authorized. Even those who favor a domestic relations exception have therefore limited it to such issues as: the granting of divorces and separations; the allowance of alimony and child support; and the determination of paternity, parental fitness, child custody and visitation. Conversely, the rationale for a domestic relations exception also defines its limits. Thus, generally speaking, a domestic relations exception has not been applied to contract or tort cases that do not involve the application of substantive state domestic relations law, even though those cases may have intrafamily aspects.

That is precisely the situation in this case. Resolution of petitioner's claim does not require adjudication of petitioner's marital or custody status, child support, visitation or alimony. Instead, this is a simple tort action between parties that were, at one time, members of the same family. Such cases do not fit within the domestic relations exception as it has been traditionally understood, and cannot be brought within an expanded definition of the domestic relations exception without seriously interfering with Congress' right to determine federal jurisdiction.

The mere fact that some of the real parties in interest are children and that the asserted tort was committed against them by their one-time custodian does not justify application of the domestic relations exception. Federal courts have repeatedly and appropriately addressed a broad range of issues brought by children when those suits have been against government custodians and have invoked federal question jurisdiction.

Finally, the courts below erred in abstaining from jurisdiction under *Younger v. Harris*, 401 U.S. 37. *Younger* permits abstention only if there are ongoing state court proceedings at the time the federal litigation is commenced. Here, all juvenile court proceedings involving the parties had concluded when petitioner filed suit in federal court and there were no other pending state court proceedings.

ARGUMENT

I. ANY DOMESTIC RELATIONS EXCEPTION TO FEDERAL DIVERSITY JURISDICTION DOES NOT APPLY TO THIS TRADITIONAL TORT CLAIM, WHICH IS BROUGHT SOLELY TO RECOVER MONEY DAMAGES FOR PAST INJURIES AND WHICH DOES NOT SEEK TO ALTER ANY PARTY'S MARITAL, PARENTAL OR CUSTODY STATUS

Assuming, *arguendo*, that there is a domestic relations exception to federal diversity jurisdiction,[3] neither

[3] As noted in the Statement of the Case, the Court granted *certiorari* on a threshold question of whether a domestic relations exception to federal jurisdiction exists. There is, in fact, substantial reason to question the authority of the historical underpinning to the domestic relations exception. *See generally Spindel v. Spindel*, 283 F.Supp. 797 (E.D.N.Y. 1968). However, for purposes of this brief, *amicus* assumes (continued...)

its historic rationale nor its contemporary purposes support the district court's decision to apply the exception to this simple tort action. In fact, the trial court's expansive application of the domestic relations exception represents a significant and unwarranted departure from a long line of federal decisions that have narrowly construed the exception to apply only to "core" domestic relations issues.

A. The Historical Rationale For The Domestic Relations Exception Does Not Support Its Application In This Case

The domestic relations exception to federal diversity jurisdiction is judge-made law, originating in *dictum* in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). In that case the Court determined that a wife could properly invoke the diversity jurisdiction of a federal court to enforce a state decree granting her a separation and alimony. Although unnecessary to its decision, the *Barber* Court prefaced its discussion of the case by "disclaim[ing] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony . . . ." *Id.* at 584. No authority was cited.

The reasoning behind this disclaimer was that divorce, child custody and related matters had historically been the exclusive province of the ecclesiastical courts in England rather than the Chancery. This jurisdictional preclusion, in turn, purportedly bound the common law and equity courts of the United States, whose jurisdiction devolves from the Chancery. *See generally* 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3609, at p.460 (1984). The criticism of this historical explanation is widespread. *See, e.g., Lloyd v.*

[3] (...continued)
the existence of the exception and limits discussion to its proper scope.

Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982)(Posner, J.); *Solomon v. Solomon*, 516 F.2d 1018, 1027 (3d Cir. 1975) (Gibbons, J., dissenting); *Spindel v. Spindel*, 283 F.Supp. at 802-03, 806-90 (Weinstein, J.). At best, however, the historical rationale for a domestic relations exception is limited to the power to grant divorces, award child custody, and allow alimony; it provides no support for the district court's refusal in this case to assert jurisdiction over a common law tort claim.

B. None Of The Modern Reasons Commonly Cited In Support Of A Domestic Relations Exception Apply To This Tort Action

Despite its dubious historical underpinnings, the existence of a domestic relations exception to federal diversity jurisdiction has been broadly accepted by the lower federal courts. *See Drewes v. Ilnicki*, 863 F.2d 469, 471 (6th Cir. 1988); *Lloyd v. Loeffler*, 694 F.2d at 492. As justification for this unwritten exception to the statutory provision for diversity jurisdiction, 28 U.S.C. §1332, those lower courts that offer any explanation most often point to "'the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts.'" *Jagiella v. Jagiella*, 647 F.2d 561, 564 (5th Cir. 1981)(citation omitted). *Accord Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 22 (1st Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 244 (1991); *Lloyd*, 694 F.2d at 492-93.

Reflecting these policy interests, the domestic relations exception has traditionally been limited to disputes involving so-called "core" or "primary" issues of domestic relations law. *See, e.g., Peterson v. Babbitt*, 708 F.2d 465, 466 (9th Cir. 1983). These include the granting of divorces and separations, the allowance of alimony and child support, and the determination of paternity, parental fitness, child custody or visitation rights. *See, e.g., Fernos-Lopez*, 929 F.2d at 22; *Ingram v. Hayes*, 866 F.2d 368, 369 (11th Cir. 1988); *Drewes*, 863 F.2d at 471-72; *Kirby v. Mellenger*, 830 F.2d 176, 177-78 (11th Cir. 1987); *Hooks v. Hooks*, 771 F.2d 935, 942 (6th Cir. 1985); *Cole v. Cole*, 633 F.2d 1083, 1088 (4th Cir. 1980); *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978). Significantly, each of these core domestic relations issues necessarily involves the application of substantive state domestic relations law in order either to determine financial support or to adjust the status of individual family members.[4]

When these core issues of state domestic relations law are not present, or not critical to the resolution of the dispute between the parties, federal courts have consistently and appropriately exercised the jurisdiction that Congress has conferred. Furthermore, a long line of federal cases holds that the domestic relations exception to federal diversity jurisdiction must be narrowly construed. *See, e.g., Rykers v. Alford*, 832 F.2d 895, 900 (5th Cir. 1987); *Kirby*, 830 F.2d at 178; *Peterson*, 708 F.2d at 466; *Phillips, Nizer v. Rosenstiel*, 490 F.2d 509, 514 (2d Cir. 1973). The fact that the exercise of federal diversity jurisdiction may incidentally have an impact on subject matter that is also cognizable in state court does not permit (much less require) a "district court . . . [to] simply avoid all diversity cases having intrafamily aspects." *Cole*, 633 F.2d at 1088. Thus, federal courts routinely and properly hear cases "whose essence is in, for example, tort or contract, and which do not require the feder-

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[4] There is disagreement among the lower courts as to whether a refusal to adjudicate core domestic relations cases represents an exercise of the court's discretionary power over its jurisdiction or whether the federal courts simply lack diversity jurisdiction over such cases. *See Jagiella*, 647 F.2d at 564 n.11. The majority of courts that have considered this question, including the Fifth Circuit, have deemed application of the domestic relations exception to be an exercise of discretion. *Id.*

al court to exceed its competence . . . ." *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C.Cir. 1982).[5]

Judged by that standard, the lower courts in this case erred in refusing to exercise federal jurisdiction. Indeed, petitioner's tort claim is exactly the type of claim over which "[t]he federal courts may not refuse jurisdiction merely because the parties were at one time in a marital relationship and the motive for the tort may spring from that source." *Drewes*, 863 F.2d at 471-72. Petitioner seeks to recover money damages on behalf of her children for past injury -- in this case the alleged sexual abuse of the children. She is not requesting declaratory or injunctive relief modifying any of the core aspects of domestic relations law, such as marital or custody status, child support, visitation or alimony.[6] Her tort claim,

[5] *See, e.g., Drewes*, 863 F.2d at 471-72 (federal court has jurisdiction over intentional infliction of emotional distress and interference with employment claims arising out of mother's concealment of child and prevention of father from exercising visitation rights); *McIntyre v. McIntyre*, 771 F.2d 1316, 1318 (9th Cir. 1985)(domestic relations exception does not apply to father's claim against former wife for intentional tortious interference with visitation rights)(per Kennedy, J.); *Wasserman v. Wasserman*, 671 F.2d 832, 834-35 (4th Cir.), *cert. denied*, 459 U.S. 1014 (1982)(federal court is competent to decide torts of child enticement and intentional infliction of emotional distress where custody of child is not in dispute); *Cole*, 633 F.2d at 1088-89 (domestic relations exception does not bar former husband's claims against former wife for malicious prosecution, abuse of process, arson and conversion); *Crouch*, 566 F.2d at 487-88 (court has jurisdiction to enforce voluntary separation agreement).

[6] This distinguishes petitioner's claim from several others cited by the trial court in support of its decision below. For example, in *Rogers v. Janzen*, 891 F.2d 95 (5th Cir. 1989), the Fifth Circuit applied the domestic relations exception to a case in which a mother, who was the noncustodial parent, sued her former husband for emotional distress caused by his alleged sexual abuse of their daughter. Unlike petitioner in the instant case, the plaintiff in *Rogers* was arguably attempting to relitigate a custody and visitation case under the guise of bringing a tort action.

therefore, does not require any inquiry into the "best interests" of the children or into other aspects of substantive domestic relations law where federal courts traditionally defer to the special concern and competence of the state. Moreover, the tort in question, sexual abuse, is one which the federal courts are "entirely competent, in this case as much as any other, to determine traditional tort issues such as the existence of a legal duty, the breach of that duty, and the damages flowing from that breach." *Bennett*, 682 F.2d at 1042.[7]

In dismissing the action below, the district court opined that resolution of Ankenbrandt's tort suit would require an inquiry into the parent-child relationship, compelling the federal court to "revisit" evidence considered in the juvenile court proceedings that resulted in the termination of Richards' parental rights. The trial court concluded that such an inquiry would cause it to become "overly involved in the state court's determination of both the abuse and the fitness of Richards as a

[7] The fact that children are real parties in interest in this case, and that the asserted tort was committed against them, does not in any way bring this case under the domestic relations exception. To the contrary, the federal courts are entirely competent and have readily addressed a large range of issues when children have brought suit against their government custodians under federal question jurisdiction seeking both individual and systemic relief. *See, e.g., Doe v. New York City Dep't of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied sub nom. Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983) (due process rights of child sexually abused by government-funded foster parent); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989)(due process rights of child physically abused by government-funded foster parents); *Parham v. J.R.*, 431 U.S. 936 (1977)(noting federal jurisdiction over a case involving due process rights of children committed to mental hospitals); *Wilder v. Bernstein*, 645 F.Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988)(equal protection and First Amendment rights of children in government-funded foster care system); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977)(due process rights of children being removed from government-funded foster homes).

parent" and that application of the domestic relations exception was warranted. *Ankenbrandt v. Richards*, 1990 U.S. Dist. LEXIS 17068, at *2.

There is no support for such a concern. The standard for determining the fitness of Richards as a parent is a state law question that was determined in state court in Louisiana and is not an issue in this case. By contrast, the standard for determining whether abuse has taken place is a the sort of traditional tort inquiry that federal courts can and do routinely resolve. *See, e.g., Doe v. New York City Dep't of Social Services*, 649 F.2d 134; *Taylor v. Ledbetter*, 818 F.2d 791.

The expansive interpretation of the domestic relations exception embraced below stems from a misunderstanding of the meaning of widely-quoted *dicta* in *In re Burrus*, 136 U.S. 586, 593-94 (1890). *See Ankenbrandt*, 1990 U.S. Dist. LEXIS 17068 (claiming that federal courts for a century have recognized the state interest set forth in *Burrus* as the foundation for a domestic relations exception). In *Burrus*, the Court observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." This broad disclaimer, however, refers not to the competence of the federal judiciary to hear domestic relations cases, but to the fact that the law governing intrafamily disputes is state law. *See Spindel*, 283 F.Supp. 797.

In sum, neither the language in *Burrus* nor the narrowly construed domestic relations exception as it has evolved support the decision below.

II. *YOUNGER* ABSTENTION DOES NOT APPLY BECAUSE THERE IS NO PENDING STATE COURT PROCEEDING

This Court has held that abstention from the exercise of federal jurisdiction is an "extraordinary and narrow exception to the duty of a district court to adjudicate

a controversy properly before it." *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 813 (1976)(citation omitted). As then-Judge Anthony Kennedy observed in the context of another tort case implicating domestic relations issues, "[a]bsent 'an important countervailing interest,' federal courts have 'the virtually unflagging obligation' . . . to exercise the jurisdiction given them." *McIntyre*, 771 F.2d at 1319.[8]

In this case, there are no "important countervailing interest[s]" and the district court clearly erred in holding that abstention was appropriate under *Younger v. Harris*, 401 U.S. 37. *Younger* abstention is appropriate only if 1) there are ongoing state proceedings of a judicial nature at the time the federal litigation is commenced; 2) the state proceedings implicate an important state interest; and 3) the state proceedings afford an adequate opportunity to raise federal claims. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).[9]

On this record, the Court need look no further than the threshold issue of whether there was any pending state proceeding at the time petitioner filed her federal complaint. There was none. The proceedings in the juvenile court terminating Richards' parental rights had been concluded and no other active case was or is pend-

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[8] In *McIntyre*, the Ninth Circuit ruled that neither the domestic relations exception to diversity jurisdiction nor the abstention doctrine apply to a case brought by a former husband against his ex-wife seeking money damages for the alleged breach of visitation rights.

[9] Even when these conditions are met, *Younger* abstention is inappropriate if the state proceedings are motivated by a desire to harass the federal plaintiff, are conducted in bad faith, or if extraordinary circumstances otherwise exist. *Huffman v. Pursue*, 420 U.S. 592, 611 (1975).

ing.[10] The fact that the juvenile court retains continuing jurisdiction over custody and visitation issues is not sufficient reason for the federal court to abstain from hearing a tort case properly before it. *Norman v. Johnson*, 739 F.Supp. 1182, 1189-90 (N.D.Ill. 1990). *Accord K.H. v. Morgan*, No. 87-C-98-33, 1989 U.S. Dist. LEXIS 10516 (N.D.Ill., Sept. 6, 1989)(mere fact of continuing jurisdiction by juvenile court over plaintiff's affairs does not require abstention), *aff'd in part, remanded in part*, 914 F.2d 846 (7th Cir. 1990). Moreover, even a pending juvenile court proceeding would not warrant abstention in these circumstances since the juvenile court has no jurisdiction over petitioner's tort claim. *Cf. Deakins v. Monaghan*, 484 U.S. 193, 202 (1988)(district court has no discretion to dismiss claims for monetary relief that cannot be redressed in the state proceeding).

"[T]he relevant principles of equity, comity, and federalism have little force in the absence of a pending state proceeding." *Huffman*, 420 U.S. at 602-03. Here, there is neither a pending state proceeding nor a contemplated state proceeding in which petitioner could obtain relief for her tort claims. Accordingly, there was no legal basis for denying petitioner the right to sue in federal court.[11]

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[10] The mere availability of a state forum for petitioner's tort claims does not mandate federal abstention. *See Monaghan v. Deakins*, 798 F.2d 632, 638 (3d Cir. 1986), *aff'd in part, vacated in part as moot*, 484 U.S. 193 (1988); *see also Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). Thus, the mere fact that a state court proceeding may be filed in the future, a possibility that has been raised by respondents in their brief in opposition to *certiorari*, is not sufficient to invoke *Younger*.

[11] *Moore v. Sims*, 442 U.S. 415 (1979), which applied *Younger* abstention to enjoin a pending state child custody proceedings, is not to the contrary. In *Moore*, unlike the instant case, the state proceedings were ongoing when the federal complaint was filed. In addition, the plaintiff in *Moore*, unlike Ankenbrandt, was requesting a federal injunction of the state proceedings.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

Marcia Robinson Lowry
(*Counsel of Record*)
Robin L. Dahlberg
Children's Rights Project
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Steven R. Shapiro
John A. Powell
Eileen B. Hershenov
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

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In The

Supreme Court of the United States

October Term, 1991

CAROL ANKENBRANDT, AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,

Petitioner,

vs.

JON A. RICHARDS AND DEBRA KESLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

SAMUEL S. DALTON, Esq.*
of the Louisiana Bar
P.O. Box 10501
Jefferson, LA 70181-0501
(504) 835-4289
Counsel for Respondent Debra Kesler

RICHARD DUCOTE, Esq.*
of the Louisiana Bar
FINE & ASSOCIATES
335-337 Decatur Street
New Orleans, LA 70130
(504) 581-5152
Counsel for Petitioner

PAUL WEIDENFELD, Esq.*
of the Louisiana Bar
144 Elk Place
Suite 1710
New Orleans, LA 70112
(504) 525-1586
Counsel for Respondent Jon Richards

*Counsel of Record

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9/26/89	1	COMPLAINT (2 summons(es) issued) (gh)
11/6/89	3	ANSWER by Debra Kesler (kh)
2/13/90	9	ANSWER by defendant Jon A Richards to pltfs' complt (kc) [Entry date 2/14/90]
3/27/90	15	MINUTE ENTRY: (3/27/90) Preliminary Conference held; Amends due w/in 60 days. Final pretrial conf set 9:00 3/5/91 bfr Judge; jury trial set 10:00 3/25/91 bfr Judge. Judge George Arceneaux Jr. (kh)
5/25/90	21	PLAINTIFF'S AMENDED complaint [1-1] & expmgr that same be filed; no new ptys added Judge Arceneaux Signed 5/29/90. (jk) [Entry date 5/30/90]
10/29/90	28	MOTION by defendant Jon A Richards, defendant Debra Kesler to dismiss case re: domestic relations exception & abstention doctrine hrg set 11/14/90 at 10:00 a.m. bfr Judge (kh) [Entry date 10/30/90]
11/16/90	33	Opp Response by plaintiff Carol Ankenbrandt to deft's motion to dismiss case re: domestic relations exception & abstention doctrine [28-1] (kh)
11/19/90	34	ORDER that mtns set for hrg 11/28/90 bfr Judge Arceneaux will be heard on briefs w/o oral argument by Judge Martin L. Feldman (kh)
12/10/90	35	ORDER & REASONS granting Defts motion to dismiss case re: domestic relations exception & abstention doctrine [28-1] Further Ordered that pltfs' complt be dismissed w/o prej. by Judge George Arceneaux Jr. (kh) [Entry date 12/11/90]

12/10/90 36 JUDGMENT: to dismiss case in favor of defts, Jon Richards & Debra Kesler, & agst pltfs, L.R. & S.R. through Carol Ankebrandt, dismissing petn w/o prej by Judge George Arceneaux Jr.. . . . CASE CLOSED. . . . (kh) [Entry date 12/11/90]

1/8/91 37 Notice of appeal by plaintiff Carol Ankenbrandt from Dist. Court decision Judg. of 12/10/90 (kh)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

L.R. AND S.R., MINORS WHO SUE THROUGH THEIR NEXT FRIEND AND MOTHER, CAROL ANKENBRANCT	*	CIVIL ACTION
	*	NO.: 89-4244
	*	SECTION "K"
Plaintiffs	*	MAGISTRATE 1
VS.	*	JURY TRIAL
JON A. RICHARDS AND DEBRA KESLER	*	
Defendants	*	

ANSWER OF JON A. RICHARDS

NOW INTO COURT, through undersigned counsel, comes Jon A. Richards, named defendant herein, who in answer to plaintiff's complaint with respect shows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

This court lacks subject matter jurisdiction over the matter complained of in the complaint.

THIRD DEFENSE

This court should abstain from considering the claims made in the petition. Such claims may be an appropriate inquiry for a state court, but they should not be litigated in a federal forum.

AND NOW IN FURTHER ANSWER TO THE SPECIFIC ALLEGATIONS OF THE COMPLAINT, THE FOLLOWING IS AVERRED:

1.

Denied for lack of sufficient information to justify a belief.

2.

It is admitted that Jon A. Richards married Carol Ankenbranct on September 18, 1982 and that two children were born of the marriage. It is further admitted that they have been divorced. All other allegations of this paragraph are denied as irrelevant and as having been obtained unconstitutionally and through coercion.

3.

Denied.

4.

Denied for lack of sufficient information to justify a belief.

5.

Denied. Jon A. Richards has never, alone or in concert, committed sexual abuse in any manner, shape, or form. Jon A. Richards has never fondled the genitals of children; Jon A. Richards has never inserted any object in the genitals of children; Jon A. Richards has never been involved in any acts of vaginal, oral or anal intercourse with children; Jon A. Richards has never chained children to a board; and Jon A. Richards has never forced any child to pose for pornographic pictures. If, in fact, any such harm has occurred, it has been occasioned by a person or persons unknown to Jon A. Richards or it has been occasioned by the petitioner, Carol Ankenbranct. The allegations of this paragraph as to acts of Jon A. Richards are without substance and without any basis in truth or in fact.

6.

Denied. Jon A. Richards caused no physical, psychological, emotional, or sexual damage to his children. If, in fact, any such harm has occurred, it has been occasioned by a person or persons unknown to Jon A. Richards or it has been occasioned by the petitioner, Carol Ankenbranct.

7.

Denied. Jon A. Richards never abused his children in any manner and never threatened them to remain silent about acts that did not occur. If, in fact, any such harm has occurred, it has been occasioned by a person or

persons unknown to Jon A. Richards or it has been occasioned by the petitioner, Carol Ankenbranct. The allegations of this paragraph as to acts of Jon A. Richards are without substance and without any basis in truth or in fact.

8.

Denied. This paragraph assumes concerted action on the part of Debra Kessler and Jon A. Richards in a scheme to abuse his minor children. No such action was ever contemplated nor did any such action ever occur. This allegation is made without any basis in truth or in fact.

9.

Denied. There has been no tortious conduct on the part of the defendant, Jon A. Richards. If the minor children have suffered physical and emotional harm, such harm was caused by a person or persons unknown to Jon A. Richards or it was occasioned by Carol Ankenbranct, or it was occasioned by such unknown person and Carol Ankenbranct acting in concert.

10.

Requires no answer.

AND NOW, IN FURTHER ANSWER TO THE CAPTIONED PETITION, JON A. RICHARDS AVERS THAT:

11.

Considering the allegations of the petition and the responses thereto, it is respectfully suggested that the court should take notice of the conflict of interest which is inherent as between Carol Ankenbranct, in her individual capacity, and Carol Ankenbranct, in her capacity as next friend and legal representative of the minor children in this litigation. It has been alleged in the answer that some or all of the harm, if there has been harm, has been caused by Carol Ankenbranct in her individual capacity; until the truth of this allegation is determined, a serious conflict exists for Carol Ankenbranct and it is not in the best interest of the children that she be the personal representative of the minor children in this litigation.

WHEREFORE IT IS PRAYED THAT this answer be deemed good and sufficient and that the complaint of the plaintiff be dismissed without cost to the defendant.

Respectfully submitted,

WALTZER & BAGNERIS

/s/

BRUCE C. WALTZER #13222
PAUL S. WEIDENFELD #13319
Attorneys for Jon A. Richards
144 Elk Place, Suite 1710
New Orleans, Louisiana 70112
(504) 525-1586

CERTIFICATE OF SERVICE
[Omitted in Printing]

[CAPTION OMITTED IN PRINTING]

ANSWER OF DEBRA KESLER TO COMPLAINT OF PLAINTIFFS

NOW INTO COURT through undersigned counsel comes Debra Kesler, named defendant herein and for answer to plaintiffs' complaint, with respect, shows:

FIRST DEFENSE

I

THE plaintiffs' complaint fails to state a claim against the defendant for which relief may be granted.

SECOND DEFENSE

I

THIS court lacks subject matter jurisdiction of the matter complained of in plaintiffs' complaint.

THIRD DEFENSE

I

The allegations of paragraph 1 of plaintiffs' complaint are denied for want of information sufficient to form a belief.

II

The allegations of paragraph 2 of plaintiffs' complaint are denied for want of information sufficient to form a belief.

III

The allegation of paragraph 3 of plaintiffs' complaint are denied for want of information sufficient to form a belief except to admit that the domicile of defendant, Debra Kesler, is in Jefferson Parish, Louisiana.

IV

The allegation of paragraph 4 of plaintiffs' complaint are denied for want of sufficient information to form a belief.

V

The allegations of paragraph 5 of plaintiffs' complaint are denied per se. Your defendant, Debra Kesler, has never acted alone or in concert with anyone to abuse, batter, sexually or otherwise, the plaintiffs herein. It just did not happen; not with Debra Kesler. Your defendant, Debra Kesler, has never sexually fondled the genitals of any children, at any place or time, including the plaintiffs. It just did not happen; not with Debra Kesler. Your defendant, Debra Kesler, has never, at any time or place caused, observed or known of any sexual penetration, whatsoever, of any children, including the plaintiffs. It just did not happen; not with Debra Kesler. Your defendant, Debra Kesler, has never, at any time or place, committed or observed any act of vaginal, oral or anal intercourse of any one, including children and the plaintiffs. It just did not happen; not with Debra Kesler. Your Defendant, Debra Kesler, has never, at any time or place, chained any one, including children and the plaintiffs to

any board. It just did not happen; not with Debra Kesler. Your Defendant, Debra Kesler, has never taken pornographic pictures of any one, including children and the plaintiffs. It just did not happen; not with Debra Kesler. Your defendant, Debra Kesler, protests the use of the Federal Judiciary to provide a forum for such vindictive, false and incompetent accusations as are set out herein.

VI

The allegations of paragraph 6 of plaintiffs' complaint are denied per se. No such severe and permanent physical, psychological, emotional and sexual damage was ever suffered by such plaintiffs as a result of any actions, non-actions, efforts or non-efforts of your defendant, Debra Kesler.

VII

The allegations of paragraph 7 of plaintiffs' complaint are denied per se. Your defendant, Debra Kesler, has never threatened any one, including children and the plaintiffs, to remain silent about any thing. It just did not happen; not with Debra Kesler.

VIII

The allegations of paragraph 8 of plaintiffs' complaint are denied per se. Your defendant, Debra Kesler, did not misrepresented herself to any court. Your defendant, Debra Kesler, did not commit any abuse, further or otherwise, upon any one, including children and the plaintiff. It just did not happen; not with Debra Kesler.

IX

The allegations of paragraph 9 of plaintiffs' complaint are denied per se. Your defendant, Debra Kesler, owes the plaintiffs no money whatsoever because she caused them no harm, whatsoever.

X

The allegation of paragraph 10 of plaintiffs' complaint requires no answer.

WHEREFORE YOUR DEFENDANT, DEBRA KESLER, PRAYS:

That the plaintiffs' complaint, after all due proceedings had be dismissed.

RESPECTFULLY,

/s/ Samuel S. Dalton
Samuel S. Dalton
Attorney
Louisiana Bar No. 4473
2001 Jefferson Highway
P.O. Box 10501
Jefferson, La. 70181-501
(504) 835 4289

CERTIFICATE OF SERVICE
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Supreme Court, U.S.
FILED
FEB 12 1992
OFFICE OF THE CLERK

No. 91-367

In The

Supreme Court of the United States

October Term, 1991

CAROL ANKENBRANDT, AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,

Petitioner,

vs.

JON A. RICHARDS AND DEBRA KESLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

RICHARD DUCOTE, Esq.
of the Louisiana Bar
Counsel for Petitioner
FINE & ASSOCIATES
335-337 Decatur Street
New Orleans, Louisiana 70130
(504) 581-5152

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1) IS THERE A DOMESTIC RELATIONS EXCEPTION TO FEDERAL COURT JURISDICTION?

2) IF SO, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING DIVERSITY JURISDICTION OVER A TORT ACTION FOR DAMAGES?

3) DID THE DISTRICT COURT IN THIS CASE ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF *YOUNGER V. HARRIS*, 401 U.S. 37 (1971)?

The Petitioner is Carol Ankenbrandt, who appears with her minor daughters, Stephanie Richards and Lorelei Richards. The Respondents are Jon A. Richards and Debra Kesler. There are no other parties to the case.

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ON APPEAL:

Ankenbrandt v. Richards, No. 91-3037 (5th Cir. May 31, 1991). Unpublished.

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. § 1254 (1), § 2101 (c). The opinion below was rendered by the Fifth Circuit Court of Appeals on May 31, 1991. A timely petition for writ of certiorari was filed on August 29, 1991, and this Court granted certiorari on January 10, 1992.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Sec. 1, United States Constitution:

The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, Sec. 2, United States Constitution:

The judicial Power shall extend to . . . Controversies between Citizens of different States . . .

28 U.S.C. § 1332:

DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different states;

. . .

STATEMENT OF THE CASE

Petitioner Carol Ankenbrandt, a citizen of the State of Missouri, filed this tort action against Respondents Jon A. Richards and Debra Kesler, Louisiana citizens, under diversity jurisdiction on September 26, 1989, in the United States District Court for the Eastern District of Louisiana (Cert.Pet.App.A-7 - A-12) on behalf of her two daughters, L.R. (born 9/18/82) and S.R. (born 12/13/84). The complaint sought only to recover monetary damages for alleged sexual and physical abuse of the children committed by the Respondents. Respondent Richards is the divorced father of the children and Respondent Kesler, an attorney, is his female companion. Prior to the commencement of this action, on August 9, 1989, the Jefferson Parish, Louisiana, Juvenile Court had entered a judgment under the state's child protection laws[1] which permanently terminated all parental rights of Respondent

[1] LA.REV.STAT.ANN. (West 1988) §§ 13:1601-1605

Richards because of the abuse, and permanently enjoined him from any contact with the children (Cert.Pet.App.A-18 - A-19). That decision was never appealed and is final under state law.

On December 10, 1990, upon the motion of the Respondents, District Court Judge George Arcenaux dismissed the suit based on the "domestic relations exception" to federal court jurisdiction and the "*Younger* doctrine" of federal abstention (Cert.Pet.App.A-3). Petitioner appealed to the Fifth Circuit Court of Appeals. On May 31, 1991, the Fifth Circuit affirmed the judgment in a *per curiam* opinion (Cert.Pet.App.A-2). Certiorari was granted by this Court on January 10, 1992.

SUMMARY OF ARGUMENT

The rulings of the District Court and the Court of Appeals are erroneous and must be reversed for the following reasons:

1) Any "domestic relations exception" to federal diversity jurisdiction is very narrow in scope and is limited only to non-pecuniary cases such as the granting of judgments of separation, divorce, awards of child custody, and visitation orders.

2) No tort action cognizable under the applicable state law where the sum claimed exceeds $50,000 falls within the "domestic relations exception," regardless of the biological relationship of the parties.

3) Any denial of federal redress for tort victims based on the biological identity of the tortfeasor would be violative of the equal protection safeguards of the Fifth Amendment.

4) The *Younger* abstention doctrine is inapplicable to this case because there are no pending state court actions and no compelling, countervailing state interest.

5) Invocation of the *Younger* doctrine in this diversity suit is in violation of the separation of powers between Congress and the courts, since Congress has not exempted this type of case from the jurisdiction of federal courts.

ARGUMENT

IS THERE A "DOMESTIC RELATIONS EXCEPTION" TO FEDERAL DIVERSITY JURISDICTION?

Despite more than a century of jurisprudential analysis and scores of cases citing its existence, including several Supreme Court decisions, there still remains a legitimate question whether there is as such a "domestic relations exception" to federal diversity jurisdiction.[2]

[2] As Judge Gibbons stated in his dissent in *Solomon v. Solomon*, 516 F.2d 1018 (3rd Cir.1975), "[T]here is no well-established domestic relations exception. . . . Rather, there is a collection of misstatements of ancient holdings and ill-considered dicta." 516 F.2d at 1030.

Even more fertile for debate is the articulation of the nature and scope of the exception.[3]

The origin of the exception described by courts over the years is neither constitutional nor statutory. First, 28 U.S.C. § 1332 and its predecessors make no mention of a "domestic relations exception." This Court first decreed that federal jurisdiction does not extend to divorce and alimony cases in *dictum* in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). In that case the Court held that the United States District Court in Wisconsin had jurisdiction in a diversity action to enforce a New York State Court decree awarding the plaintiff a legal separation and alimony. While allowing the enforcement of an already-entered decree, the Court pointed out that the District Court was not asked to determine alimony anew. The seminal language followed: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board." 62 U.S. (How.21) at 584. In *Simms v. Simms*, 175 U.S. 162 (1899), that dicta was reiterated. It was not until the Court's

[3] See Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 Notre Dame L.Rev. 1 (1984); Baron, *The Evolution of Domestic Relations Cases in Our Federal Courts*, 1985 S. Ill. L.J. 353; Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 Hastings L.J. 571 (March, 1984); Comment, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 Columbia L.Rev. 1824 (1983); Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 Boston Col.L.Rev. 661 (1983); Comment, *A Proposal for Abolishing the Domestic Relations Exception*, 71 Marquette L.Rev. 141 (1987).

rulings in *De La Rama v. De La Rama*, 201 U.S. 303 (1906) and *Ohio ex rel. Popovici v. Agler*, 280 U.S. 389 (1930), that any explanation or authority for this disclaimer was urged. In *De La Rama*, the Court offered the tenuous rationale that a husband and wife cannot usually be citizens of different states and, the more logical argument, that divorce itself involves no pecuniary value. The major flaw in the first justification is that, while married couples are usually citizens of the same state while living together, the breakup precipitating the divorce action may well place a state border between them. Further, the ancillary implications of divorce are by all means pecuniary. In *Popovici* an altogether new reason was advanced, i.e., the term "civil proceedings" does not encompass what formerly would have belonged to the ecclesiastical courts, such as divorce actions. Child custody matters were added to the parameters of the exception in *In re Burrus*, 136 U.S. 586 (1890), again in broad, unsupported language[4]: "The whole subject of the domestic relations of husband and wife, parent and child,[5] belongs to the laws of the States and not to the laws of the United States." 136 U.S. at 593-594. However, it is important to

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[4] This wording tracks language in *Simms, supra*, but Simms did not deal with a parent and a child.

[5] Federal courts routinely evaluate parent-child relationships in the context of loss of consortium claims in personal injury and wrongful death actions. Although the purpose of those inquiries is to place a dollar value on the lost relationship, the depth and quality of the relationship must be examined. See *Crumpton v. Gates*, 947 F.2d 1418 (9th Cir.1991); *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974); *Love v. Davis*, 353 F.Supp. 587 (E.D.La.1972); *De Centeno v. Gulf Fleet Crews*, 798 F.2d 138 (5th Cir.1986).

note that *Burrus* was actually confined to the issue of whether the federal courts could make a child custody award under the habeas corpus statutes absent diversity jurisdiction. The question of custody cases within the diversity criteria was expressly reserved.[6] Without further defining these "domestic relations of husband and wife, parent and child," the Court has left the federal courts below with an escape hatch through which to avoid adjudicating matters which for one reason or another sound too much like family business. See Hart & Wechsler, *The Federal Systems and the Federal Courts* 1460-1464 (1988). With consistency, predictability, and logic eluding the lower courts in their attempt to define and apply the exception, there is no consensus on whether the exception is actually a limitation on judicial power or an exercise of discretionary abstention.[7] Indeed, in *Thompson v. Thompson*, 484 U.S. 174 (1988), while refusing to recognize the existence of a federal cause of action to enforce the Parental Kidnapping Prevention Act[8], this

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[6] "But whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case, for the order for a violation of which the petitioner is imprisoned for contempt is not a judgment of the Circuit Court of the United States, but a judgment of the District Court of the same District." *Burrus*, 136 U.S. at 596.

[7] See Hart & Wechler, at 1468. See also, discussion of applicability of *Younger* doctrine to this case, *infra*. See also, *Sutter v. Pitts*, 639 F.2d 842 (1st Cir.1981); *Peterson v. Babbit*, 708 F.2d 465 (9th Cir.1983).

[8] 28 U.S.C. § 1738A.

Court only alluded to the exception and characterized it not as a Constitutional or statutory creature, but as "the longstanding *tradition* of reserving domestic relations matters to the States." 484 U.S. at 186, n. 4 [emphasis added].

In the final analysis, if the historical underpinnings of *Barber, Simms, De La Rama, Burrus, and Popovici* are invalid, there should be no "domestic relations exception" to diversity jurisdiction. In fact, in *Spindel v. Spindel*, 283 F.Supp. 797 (E.D.N.Y.1986), the learned Judge Weinstein effectively refuted the grounds previously asserted to justify the exception. As he so thoroughly points out, with abundant citation, there is simply no accuracy in the statement that ecclesiastical courts were the sole adjudicators of separation and divorce prior to the enactment of the Constitution.[9] Likewise, he documents many federal decisions involving aspects of marital or familial status and observes:

> Despite occasional extravagant disclaimers, it has long been recognized that the federal courts are competent to determine matters involving some aspects of marital status, either directly or indirectly. The fact that, incidental to the exercise of federal jurisdiction, there is an impact or effect on a matter which is cognizable in the state court cannot divest the federal court of its

[9] It should also be noted that ecclesiastical courts historically had jurisdiction over ordinary criminal and civil matters as well. See Wunderli, *London Church Courts and Society* (1981); Wunderli, *Ecclesiastical Courts in Pre-Reformation London* (1975); Houlbrooke, *Church Courts and the People During the English Reformation* (1979); Rodes, *Ecclesiastical Administration in Medieval England* (1977).

> power [extensive citations omitted]. 283 F.Supp. at 810.

In conclusion, there is no legitimate "domestic relations exception" to diversity jurisdiction. Yet, the federal courts need no such exception to avoid granting divorces, awarding child custody, and fixing parental visitation. These issues simply do not meet the diversity criteria since the matters in controversy do not cross the $50,000 threshold of 28 U.S.C. § 1332. A literal reading of the statute will shield the federal courts from their worst nightmare of attracting the throngs now milling about the local divorce courts. However, suits between citizens of different states involving claims of $50,000 or more, even if that sum represents alimony, child support, or property division, are still properly in federal court until Congress amends § 1332 to read otherwise. Under that interpretation the separation of powers concern, discussed *infra*, is not looming and reliance upon questionable abstention practices is not necessary.

IF THERE IS A DOMESTIC RELATIONS EXCEPTION TO FEDERAL DIVERSITY JURISDICTION, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING JURISDICTION OVER A TORT ACTION FOR DAMAGES?

While the tort claims aspect of any "domestic relations exception" has never been addressed specifically in this Court, it is clear that federal courts must exercise diversity jurisdiction over tort claims properly pled if the alleged tort is cognizable under the relevant state substantive law and the other criteria of § 1332 are satisfied. The decision at issue and the line of Fifth Circuit cases

supporting it are the most extreme of any circuit's and disregard this Court's observation in *Deakins v. Monaghan*, 484 U.S. 193 (1988):

> This Court has repeatedly stated that federal courts have a "virtually unflagging obligation" to exercise their jurisdiction except in those extraordinary circumstances "where the order to the parties to repair to the State would clearly serve a countervailing interest." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 817, 47 L.Ed.2d 483, 96 S.Ct. 1236 (1976), quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 3 L.Ed.2d 1163, 79 S.Ct. 1060 (1959); see also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-15, 74 L.Ed.2d 765, 103 S.Ct. 927 (1983). 484 U.S. at 203.

In *Deakins*, the Court in an analogous situation reversed the dismissal of a suit for damages, but agreed to stay the action until resolution of the underlying state criminal case. That approach has been used in tort actions involving family members where there is an ongoing state court action over the same facts and issues. See *Acord v. Parsons*, 551 F.Supp. 115 (W.D.Va.1982).

Despite the extreme position taken by the Fifth Circuit in the case at bar and its predecessors[10], other circuits

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[10] *Jagiella v. Jagiella*, 647 F.2d 561 (5th Cir.1981); *Rogers v. Janzen*, 891 F.2d 95 (5th Cir.1989); *Goins v. Goins*, 777 F.2d 1059 (5th Cir.1985); and *Crouch v. Crouch*, 566 F.2d 486 (5th Cir.1978). It might be wondered where the Fifth Circuit would draw the line in closing the courthouse door on relatives. First cousins? Brothers-in-Law?

generally do not apply the exception to intrafamilial tort actions. In *Bennett v. Bennett*, 682 F.2d 1039 (D.C.1982), the court denied the application of the exception in a tort claim for custody interference, but applied the exception to injunctive relief. The exception has been held inapplicable in tort cases stemming from custody and visitation disputes in *Cole v. Cole*, 633 F.2d 1083 (4th Cir.1980); *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir.1982), *cert. den.* 459 U.S. 1014; *Raftery v. Scott*, 756 F.2d 335 (4th Cir.1985). Similar results were reached in *Drewes v. Ilnicki*, 863 F.2d 469 (6th Cir.1988); *Hooks v. Hooks*, 771 F.2d 935 (6th Cir.1985); and *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir.1982). In *McIntyre v. McIntyre*, 771 F.2d 1316 (9th Cir.1985), the court reversed the dismissal of a father's tort action against his former wife and her relatives for violation of his visitation rights. The court held that the exception was inapplicable where 1) questions of status were not involved, 2) there was no interference with pending state court domestic relations proceedings, 3) no alteration of state court judgment is involved, and 4) state court's supervision of a minor was not impinged.

Beyond the logical and statutory arguments that tort actions should not be excluded where the parties are family members, a denial of redress in federal court simply because the tortfeasor is a relative violates the equal protection guarantees of the Fifth Amendment.[11] In

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[11] The Due Process clause of the Fifth Amendment imposes on the federal government the equal protection standards imposed on the States by the Fourteenth Amendment. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

Moran v. Beyer, 734 F.2d 1245 (7th Cir.1984), the court declared unconstitutional under an equal protection analysis an Illinois statute which prohibited one spouse from suing another since the law was not rationally related[12] to any tendered purpose, such as maintaining marital harmony. In that case, a wife sued her husband in federal district court under diversity jurisdiction to recover damages for years of physical abuse. Although the "domestic relations exception" was never raised nor addressed, the district court dismissed the suit under the state statute. In reversing that order, Judge Evans observed facts applicable to the instant case[13]:

> Had the paths of these two individuals crossed under any circumstances other than marriage, the district court [under diversity jurisdiction] would have proceeded to weigh their allegations and decide who, on the basis of the evidence, should win the case. 734 F.2d at 124.

Using the language of Justice Blackmun in his concurring opinion in *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 442 (1982), it takes "something more than the strained imagination" to even place physical beatings and

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[12] The court applied the standard of *Scweiker v. Wilson*, 450 U.S. 221 (1981), i.e., whether the statute's purpose is reasonable and whether the statute rationally advances that purpose. That is the test in the case at bar.

[13] Although Respondent Kesler is in no way related to these children, she has also been included within the exception. Given the Fifth Circuit's harsh interpretation of the exception, she would probably have been successful in pleading the exception had she been alone as a defendant, despite the unreasonableness of that result.

the type of heinous sexual abuse of these small children pled in the instant case[14] within the definition of "domestic relations." Accordingly, it has been held to be a violation of equal protection safeguards for police departments to treat victims of domestic violence differently than other crime victims. *Watson v. Kansas City*, 857 F.2d 690 (10th Cir.1988); *Balistreri v. Pacifica Police Department*, 855 F.2d 1421 (9th Cir.1988); *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D.Conn.1984). There is absolutely no rational federal purpose in discriminating in the application of § 1332 against those plaintiffs victimized by their relatives, so to do so is unconstitutional. The absence of purpose is especially compelling when the damages sought are compensation for acts of violent abuse.

As discussed *supra*, courts have been unclear in their determinations as to whether refusal to hear this broad group of so-called "domestic relations cases" stems from a lack of jurisdiction or from an abstention from the exercise of authorized jurisdiction. Again, since § 1332 does not specifically provide for such an exception where diversity exists and the claim exceeds $50,000, federal courts have jurisdiction to adjudicate the case. Further analysis of this point requires discussion of Article III of the Constitution and the doctrine of separation of powers, addressed below.

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[14] Sexual fondling, penetration with objects, chaining the children to boards, and pornographic photography (Cert.Pet.App. p.A-8).

DID THE TRIAL COURT IN THIS CASE ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF *YOUNGER V. HARRIS*, 401 U.S. 37 (1971)?

The doctrine of *Younger v. Harris* provides that the federal courts should not interfere with state court criminal proceedings under the principle of "comity." The Court defined comity as respect for States and their institutions which should be free to perform "their separate functions in their separate ways." 401 U.S. at 44. Moving beyond criminal proceedings, the doctrine has been applied to a variety of cases.[15]

First, assuming for the sake of this initial argument that *Younger* and its general application to civil matters is legitimate, the case before the Court does not meet the *Younger* abstention criteria and it was therefore error for the District Court to invoke it in dismissing the complaint. Fatal to the *Younger* approach is the absence of pending state court proceedings. The unappealed juvenile court judgment "finally and unalterably" terminating all of Respondent Richards' parental rights[16] ended the involvement of Louisiana and its court system. The prospect that Richards might someday reopen his state court custody cases, as "feared" by the District Court[17] should he win the federal suit, is also insufficient justification

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[15] *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) [civil nuisance action]; *Judice v. Vail*, 430 U.S. 327 (1977) [contempt proceedings]; *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986) [administrative proceedings].

[16] See Cert.Pet.App. pp.A-18 - A-19.

[17] See District Court Order, Cert.Pet.App. p. A-5, n.4.

for *Younger* abstention. As this Court noted in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), *Younger*-type abstention does not apply when state judicial proceedings have not yet commenced[18].

Further, contrary to The District Court's assumption, child abuse, and particularly child sexual abuse, is not a concern solely within the province of state law. In fact, state law and state courts have come under attack for inappropriate responses to abuse cases, particularly when the abuser is the divorced parent of the child victim.[19] Concurrently, Congress has created a growing federal presence in the policy making and funding of strategies to combat the child abuse problem.[20] The lower federal courts have likewise proved themselves competent to analyze and judge child abuse problems. See *United States v. Iron Shell*, 633 F.2d 77 (8th Cir.1980), *cert. den.* 450 U.S. 1001 (1981); *United States v. Nick*, 604 F.2d 1199

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[18] Cf. *Moore v. Sims*, 442 U.S. 415 (1979), where *Younger* was held applicable to a federal suit enjoining *ongoing* Texas child abuse litigation.

[19] See Keating, *Children in Incestuous Relationships: The Forgotten Victims*, 34 (1) Loyola L.Rev. 111 (1988); Comment, *Civil Contempt and Child Sexual Abuse Allegations*, 40 Emory L.Rev. 203 (1991).

[20] See Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 et seq.; Victims of Child Abuse Act of 1990, 42 U.S.C. § 13001 et seq.; Indian Child Protection and Family Violence Protection Act, 18 U.S.C. § 1169; National Clearinghouse on Family Violence Prevention, 42 U.S.C. § 10407; H.Con.Res. 172 (1990) [Expression of Congressional intent that state courts should not award custody of children to perpetrators of domestic violence].

(9th Cir.1979); *Morgan v. Foretich*[21], 846 F.2d 941 (4th Cir.1988) [with Retired Justice Lewis Powell sitting on the panel].

Thus examined, a *Younger* abstention here violates the "unflagging obligation" of the District Court to exercise its grant of diversity jurisdiction over this tort action. *Deakins v. Monaghan*, supra.

A more basic question, however, is whether the *Younger* doctrine should now be seen in its essence as an unacceptable breach of the separation of powers allocated between the Congress, who defines the scope of federal jurisdiction under Article III of the Constitution, and the courts who exercise the grant of jurisdiction.[22] Given the Court's discussion in *New Orleans Public Service v. New Orleans City Council*, 491 U.S. 350 (1989), regarding the problems inherent in *Younger* abstention, the better reasoned approach is to abandon *Younger* as a fountain

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[21] Although the "domestic relations exception" and *Younger* abstention were not raised at the trial or appellate level, this tort action was tried simultaneously with the state (District of Columbia) court child custody and visitation proceedings. Although the Fourth Circuit made its own finding that the sexual abuse of the child by the father had been proved, a contrary decision was consistently reached by the District of Columbia courts. *Morgan v. Foretich*, 546 A.2d 407 (D.C.1988); 521 A.2d 248 (D.C.1987); 528 A.2d 425 (D.C.1987). Even in this extreme situation, the federal and state systems performed their parallel functions without interference from the other.

[22] See Brown, *When Federalism and Separation of Powers Collide-Rethinking Younger Abstention*, 59 George Washington L.Rev. 114 (1990); Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing,"* 40 Case Western L.Rev. 1023 (1990).

of jurisdictional law, and instead return to Congress the responsibility for shaping the contours of federal authority. Since Congress has not exempted tort actions against fathers in § 1332, the District Court erred and the decisions below must be reversed.

CONCLUSION

For the reasons set forth above, the decisions of the United States District Court for the Eastern District of Louisiana and the United States Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for trial.

Respectfully submitted,

RICHARD DUCOTE, Esq.
Counsel for Carol Ankenbrandt
FINE & ASSOCIATES
335-337 Decatur Street
New Orleans, LA 70130
(504) 581-5152

Supreme Court, U.S.
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NO: 91-367

IN
THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CAROL ANKENBRANDT,
AS NEXT FRIEND AND MOTHER OF L.R. AND S.R.,
PLAINTIFF, APPELLANT, PETITIONER

VS.

JON A. RICHARDS AND DEBRA KESLER,
DEFENDANTS, APPELLEES, RESPONDENTS

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT BRIEF OF JON A. RICHARDS AND DEBRA KESLER

SAMUEL S. DALTON
ATTORNEY FOR
DEBRA KESLER,
RESPONDENT
P.O. BOX 10501
JEFFERSON, LA
70181-0501
(504) 835-4289

PAUL WEIDENFELD
ATTORNEY FOR
JON A. RICHARDS,
RESPONDENT
144 ELK PLACE
NEW ORLEANS, LA
70112
(504) 525-1586

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1) IS THERE A DOMESTIC RELATIONS EXCEPTION TO FEDERAL COURT JURISDICTION?

2) IF SO, DOES IT PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING DIVERSITY JURISDICTION OVER A TORT ACTION FOR DAMAGES?

3) DID THE DISTRICT COURT IN THIS CASE ERR IN ABSTAINING FROM EXERCISING JURISDICTION UNDER THE DOCTRINE OF YOUNGER V. HARRIS, 401 U.S. 37 (1971)?

PARTIES TO THESE PROCEEDINGS

PLAINTIFFS:

CAROL ANKENBRANDT, PETITIONER ON BEHALF OF HER MINOR DAUGHTERS, STEPHANIE RICHARDS AND LORELEI RICHARDS.

RESPONDENTS:

JON A. RICHARDS
AND
DEBRA KESLER

THERE ARE NO OTHER PARTIES TO THIS PROCEEDING, YET.

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DECISIONS BELOW

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ANKENBRANDT V. RICHARDS, NO. 89-4244 (E.D.LA. DECEMBER 10, 1990). UNPUBLISHED.

UNITED STATES COURT OF APPEAL FOR
THE FIFTH CIRCUIT

ANKENBRANDT V. RICHARDS, NO. 91-3037 (5TH CIR. MAY 31, 1991). AFFIRMED, WITHOUT OPINION. 934 F.2d 1262(5TH CIR. 1991).

GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction in this cause pursuant to 28 U.S.C. Sec. 1254 (1), Sec. 2101(c). A timely petition for Writ of Certiorari was filed on August 29,1991, being within 90 days of the opinion of the 5th Circuit. This Court granted Certiorari on January 10, 1992.

RELEVANT CONSTITUTIONAL

AND

STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES, 10TH AMENDMENT THEREOF:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the Sttes respectively, or to the people.

CONSTITUTION OF THE UNITED STATES, ARTICLE III, SECTION 2, THEREOF:

> The judicial power shall extend to ... controversises between Citizens of different States ....

28 U.S.C. SECTION 1332:

> Diversity of Citizenship; Amount in Controversy; Costs:
> a) The district courts shall have original judicition of all civil actions where the matter in controversy exceeds the sum of value of $50,000, exclusive of interest and costs, and is between -
> 1) citizens of different states.
> ...

STATEMENT OF THE CASE

THIS action was filed on September 26, 1989, with Jurisdiction premised upon diversity of citizenship. Defendant, Kesler, answered on November 6, 1989, denying, specifically, each and every allegation of the complaint. Defendant, Richards, answered on February 13, 1990, denying, specifically, each and every allegation of the complaint. Kesler and Richards challenged the subject matter jurisdiction in their answers. An amended complaint was filed on May 25, 1990, amending dates. On October 29, the 1990, the defendants, Richards and Kesler, jointly filed a Motion To Dismiss, grounded upon The Domestic Relations Exception to Federal Jurisdiction and the Abstention Doctrine of Comity and Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971).

Plaintiffs L.R. and S.R. filed an opposition on November 16, 1990. The matter was decided, without oral argument, on the written Memorandums submitted by both the Plaintiffs and the Defendants. The Honorable George Arceneaux, District Judge, Presiding, granted the Motion and dismissed the Complaint, without prejudice. Written reasons were assigned. Judgment of Dismissal was entered on December 10, 1990.

Plaintiff timely notice an appeal to the United States Court of Appeal, 5th Circuit. On May 31, 1991, the Fifth Circuit affirmed the Judgment in a per curiam opinion, 934 F.2d 1262 (5th Cir. 1991).

This Honorable Court granted Certiorari on January 10, 1992, limited to the following questions:

> 1) Is there a domestic relations exception to federal Jurisdiction ?

> 2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages?
>
> 3) Did the District in this case err in abstaining from exercising jurisdiction under the doctrine of Younger v. Harris, 401 U.S. 37 (1971)?

SUMMARY OF ARGUMENT

The District Court and the Court of Appeals were correct in applying the Domestic Relations Exception to Federal Jurisdiction and dismissing this matter for the following reason:

1) That the Domestic Relations Exception to Federal Jurisdiction include torts between Parent and Child.

Alternatively, the District Court did not abuse its discretion in abstaining based upon the prinicples of Comity and Federalism which underlie the Doctrine of Younger v. Harris, 401 U.S. 37, 91 S.Ct 746 (1971).

ARGUMENT

IS THERE A DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION?

YES. It is powerful enough to defeat the sweeping language of the United States Constitution found in Article III, Section 2, thereof, in granting this Honorable Court original jurisdiction in all cases

affecting ambassadors, other public ministers, and consuls. Justice Holmes in Popovici, Vice Consul of Roumania v. Agler et als, 280 U.S. 379, 50 S.Ct. 154 (1930) left no doubt that this Court recognized and applied the Domestic Relations Exception to Federal Jurisdiction:

> "The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 18 S.Ct. 685, 42 L.Ed. 1126. The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to Courts of the United States. Therefore they do not affect the present case it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the

> Statutes. Suits against 'consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.
>
> . . . .
>
> In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go." (emphasis added).

This Domestic Relations Exception to Federal Jurisdiction has been firmly established since first recognized in

Barber v. Barber, 62 U.S. 582, 16 L.Ed. 226, (1858), to-wit:

> "Our first remark is -- and we wish it to be remembered-- that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction.
> ....
>
> We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to

> divorce a vinculo, or to one from bed and board."

In 1890 the Exception was powerful enough to both defeat and respect the Great Writ of Habeas Corpus as treated by this Court in Ex Parte Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890). In that matter an Ohio Father made application to the United District Court in Nebraska for a Writ of Habeas Corpus to recover the care and custody of his minor child who was in the physical custody of her Grandparents, Thomas F. and Catherine Burrus, a citizen of Nebraska. The Writ was issued.

After hearing the response to the Writ the District Judge found that the minor child was improperly detained by the Grandparents and entered and order awarding the care and custody of the child to the Ohio Father. Subsequently, the child was placed in custody of the Ohio Father and

while in such custody the Grandparents managed to retake physical custody of the child, with violence, and return to the State of Nebraska.

The Nebraska District Court attached the Grandparents and brought them before the Court to answer for contempt in disobeying the order. Found in contempt the Grandfather was imprisoned, in the custody of the U.S. Marshall for three months, in the county jail. The Grandfather filed an application for the Great Writ in the original jurisdiction of the U.S. Supreme Court. This Honorable Court defined the question to be whether the District Court in Nebraska, or the Judge thereof, has any jurisdiction for the Father's Writ of Habeas Corpus and this was the sole question to be decided.

After reciting that the "whole subject of domestic relations of husband and wife,

parent and child, belongs to the laws of the States, and not to the laws of the United States" the Court declared that:

> "we have already said that the relations of the father and child are not matters governed by the laws of the United States, and that the writ of habeas corpus is not to be used by the judges or justices or courts of the United States, except in cases where it is appropriate to their jurisdiction. .... Whatever, therefore, may be held to be the powers of the circuit court in cases of this kind, where necessary citizenship exists between the contestants, which gives the court jurisdiction of all matters between such parties, both in law and equity, where the matter exceeds $2,000 in value, we know of no statue, nor provisions of law, no authority intended to be conferred upon the district court of the United States to take cognizance of a case of this kind, either on the ground of citizenship, or on any other ground found in this case."

Consequently, this Court declared the whole proceeding before the district judge in the district court was void and the

attempt to enforce the judgement by attachment and imprisonment of Burrus (the Grandfather) for contempt is equally void. The Grandfather's application for the Writ of Habeas Corpus was granted by ordering his release from imprisonment.

In Simms v. Simms, 175 U.S. 162, 20 S.Ct. 58, 44 L.,Ed. 115 this court re-affirmed the Domestic Exception to Federal Jurisdiction citing Ex Parte Burrus, supra, by repeating its premise and declaring that, "It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. Within the states of the Union, the whole subject of the domestic relations of husband and wife, parent and

child, belongs to the laws of the States and not the laws of the United States".

This court has never treated the question, even where it allows the enforcement of a state or territorial judgment, without reminding that Domestic Relations Exception to Federal Jurisdiction is present. In every case concerning issues between Husband and Wife, Parent and Child, the Court re-iterates the Exception, whether applicable in a particular case or not. [See De La Rama v. De La Rama, 201 U.S. 303, 26 S.Ct. 485 (1906)].

In Popovici v. Agler, supra., Justice Holmes declared that the whole subject of domestic relations belongs to the laws of the States and if when the Constitution of was adopted the common understanding was that the domestic relations of Husband and Wife and Parent and Child were matters

reserved to the State, there is no difficulty in construing the instrument accordingly and not much in dealing with the Statutes. The remark, "reserved to the State", obviously referred to the 10th Amendment of the U.S. Constitution.

Since the common law relation between husband and wife did not allow tort suits between them[1], such cause of action arose after the concept of diversity as expressed in Article III, Section 2 of the U.S. Constitution and subsequent statutes, including 28 U.S.C. Sec. 1332, and then only by express permission of the States. Since such causes did not exist at the time

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[1] See Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180 (1910). The U.S. Supreme Court, itself, recognized the common law, as it existed in 1910 and in spite of a legislative act giving women to the right to sue for torts, still barred such tort action (assault and battery), based on that common law, against the Husband.

of adoption of the Constitution, the States did not delegate the power to control such suits by a congressional creation of "Diversity of Citizenship". Of course, neither did the 10th Amendment wrest from the States control of such suits, under the guise of "Diversity of Citizenship".

As to Child and Parent, under the common law concerning a tortious parent, that view was clearly expressed by the Mississippi Supreme Court in Hewlette v. George, 68 Miss. 703, 9 So. 885 (1891), to-wit:

> The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the

child can be heard to demand. Hewlette v. George, 68 Miss. 703 at 711, 9 So. 885 at 887.

A Domestic Exception to Federal Jurisdiction Exists and it covers the whole subject of Domestic Relations from the contract of marriage to dissolution and the consequences thereof, including acts occuring while the marriage and parent and child relationship was in existence, as the States define such subject, including but not limited to torts between Husband and Wife and Parent and Child.

The Domestic Relations Exception to Federal Jurisdiction, as laid out by Barber v. Barber, 62 U.S. 582 (1858), Ex Parte Burrus, 136 U.S. 586, 10 S.Ct. 850 (1890) and Popovici v. Agler, et al, 280 U.S. 379, 50 S.Ct. 154 has survived over 130 Sessions of Congress, since 1859 and by this Court since the Barber decision in the December Term of 1858.

DOES THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL DIVERSITY JURISDICTION PERMIT A DISTRICT COURT TO ABSTAIN FROM EXERCISING JURISDICTION OVER A TORT ACTION FOR DAMAGES?

If the Domestic Relations Exception to Federal Jurisdiction exists, and we say it does, it not only permits the District Court to Abstain form exercising Diversity Jurisdiction but requires it to dismiss the complaint, without prejudice, to enter State Court.

As this Court recognized in Thompson v. Thompson, 218 U.S. 611, 31 s.Ct. 111, 54 L.Ed. 1180 (1910) the common law did not allow suits between Husband and Wife. The Mississippi Supreme Court, in Hewlette v. George, 68 Miss. 703, 9 So. 885 (1891) correctly set out the common law view as it relates to suits between the child and a Parent; there was no such creature.

The states have, among themselves, to whatever extent changed the Common Law. No

uniform standard has been accepted by all of the States. For example Louisiana has prohibited unemancipated children from suing their parents during the existence of the Parents' marriage.[2] Further, Louisiana prohibits tort suits between Husband and Wife, during the existence of the marriage[3].

It is true Louisiana allows suit, in tort, between the spouses after the marriage is dissolved. LSA-Civ. Code Art. 3469. It is also true in Louisiana that children can sue the non-custodial parent after the marriage is dissolved. A tort

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[2] LSA-R.S. 9:571: The child who is not emancipated cannot sue:
(1) Either parent during the continuance of their marriage, when the parents are not judicially separated; or
(2) The parent who is entitled to his custody and control, when the marriage of the parents is dissolved, or the parents are judicially separated.

[3] LSA-R.S. 9:291.

occurring between the spouses or parent and child is a "Domestic Tort" and such tort has to be placed in limbo, waiting for either the child to cease being a child by becoming an adult or the until the marriage is dissolved so that custodial spouse can sue on behalf of the minor. This is state control of torts, solely because of the "Domestic Relationship".

In Alabama its Supreme Court found it necessary to judicially create an exception to parental immunity and allow children to sue their parents for the tort of sexual abuse. However, solely and only, because of the Domestic Relation between Parent and Child treated this tortious act differently than the same tort occurring between legal strangers: the Alabama Court, in its own language, "we do deem it appropriate, however, to require that the proof of alleged sexually abusive conduct be tested

under a 'clear and convincing' standard, as opposed to a mere 'substantial evidence' standard." Hurst v. Capitell, 539 So2d 264 (Sup. Ct. Alabama, 1989).

Each State that approaches the common law doctrine of Spousal and Parental Immunity approaches it with caution. Realizing such doctrine has a special status and involves deep Domestic Relations of it citizens, while such State or States makes exceptions it belongs to the States' interest in its Domestic Relations between the family. The Domestic Relations Exception to Federal Jurisdiction should and ought to be allowed to go where the States take it; the concept of diversity of citizenship, notwithstanding.

The District Court and the Fifth Circuit Court of Appeal acted properly when they applied the Domestic Exception to Federal Jurisdiction, in this matter, and

dismissed the complaint, without prejudice.

ALTERNATIVELY:

THE DISTRICT COURT DID NOT ERR IN ABSTAINING UNDER THE DOCTRINE OF YOUNGER V. HARRIS, 401 U.S. 37 (1971).

The complex interrelationship between the Union and the separate states is framed by the concepts of Comity and Federalism. Termed "Our Federalism" in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669, it forms the "underlying reason" behind abstention in cases which fall under the "Younger doctrine". Id. 401 U.S. at 37, 91 S.Ct. at 746. As articulated by Justice Black:

> ... an even more vital consideration, the notion of "Comity", that is, a proper respect for state functions, a

recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that

this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. 401 U.S. at 44-45, 91 S.Ct. at 750-51.

In Huffman v. Pursue, Ltd. 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975) the "civil counterpart" to Younger, informed by the "considerations of comity and federalism which underlie Younger", led to the conclusion that the District Court incorrectly entertained "a pre-appeal interference with a state judicial proceeding" involving a state nuisance statute because such considerations:

> ... permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious 420 U.S. at 610, 95 S.Ct. at 1211.

Judice v. Vail 430 U.S. 336, 97 S.Ct. 1211, 51 L. Ed.2d 376 (1977) and Trainor v. Hernandez 431 U.S. 434 97 S.Ct. 1911, 52 L.Ed.2d 486 extended the "Younger doctrine" to civil proceedings (an extension the Court restricted to its facts in Huffman, Id.) beyond those 'in aid of and closely related to criminal statutes' and further suggested that Comity, as a doctrine unto itself, was "by no means a novel [one]". Judice v. Vail 430 U.S. at 335, 97 S.Ct. at 1217, citing Ex parte Young 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The following passage being explicative:

> These cases rather, are "an application of the reason underlying the Act." Toucey v. New York Life Ins., Co., 314 U.S. 118, 135, 62 S.Ct. 139, 145, 86 L.Ed. 100 (1941), and reflect the applicability, wholly independent of a statutory codification, of the longstanding policies which

> inhere in the notions of comity and federalism, see Younger, 401 U.S., at 43-45, 91 S.Ct., at 750-751; 1 J. Kert, Commentaries on American Law *411-412. 430 U.S. at 335, 97 S.Ct. at 1217 at note 11.

The component parts of "Our Federalism", comity and federalism, have thus been in existence since the creation of our form of government even if the "doctrine of Younger v. Harris" is only twenty years old.

In Younger the plaintiff sought that the federal district court, in its role as an Equity Court, enjoin the District Attorney of Los Angeles County from prosecuting him. It was alleged "that the prosecution and even the presence of the Act [which he was accused of violating] inhibited him in the exercise of his rights of free speech and press, rights guaranteed him by the First and Fourteenth Amendments". 401 U.S. at 39. 91 S.Ct. at 748. The district court was also asked to

declare the Act as being in violation of the Constitution.

Such interference, should it have been granted, would have violated the line of jurisprudence holding that the equity power of the court must be restrained from interfering with criminal prosecutions absent a showing of "extraordinary circumstances, where the danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 U.S. 240, 244, 46 S.Ct. 492, 493, 70 L.Ed 927 (1926). See also Spielman Motor Sales Co. v. Dodge, 295 u.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322; Beal v. Missouri Pac. R. Co., 312 U.S. 45, 61 S.Ct.418, 85 L.Ed. 577.

The powerful interest of the State in its criminal proceedings was in conflict, however, with the interest of the national government in protecting against the abridgment of First Amendment freedoms. And, where the chilling effect on the First Amendment was sufficiently serious for the

Court to grant injunctive relief in Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), the Younger court distinguished the cases and found, however serious the threat to the First Amendment, "comity, and federalism", or "Our Federalism" demanded that injunctive relief be denied.

A significant concern not addressed in Younger was the command, initially intoned by Chief Justice Marshall in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405, 5 L.Ed 257 (1821), and quoted many times thereafter:

> We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

Consideration of the "virtually unflagging obligation" to exercise

jurisdiction first appeared in the "Younger context" in Colorado River Water Conservation Dist. v. United States 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). Thereafter, in addition to the concern of the Federal Courts' in enforcing the Constitution and protecting constitutional rights of individuals in its traditional role as a court in equity; the court recognized that a failure to act in that role "treason to the Constitution".

Yet, even as the balance of these extraordinary federal interests were weighed against ever decreasing state interests "the principle of comity"[4], or "the Younger doctrine"[5], still acted to

[4] Fair Assessment in Real Estate Ass'n v. McNary 454 U.S. 100, 119, 102 S.Ct. 177, 187, 70 L.Ed.2d 271 (1981).

[5] Moore v. Sims 442 U.S. 415, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994, (1979).

stay the hand of federal courts in numerous cases.[6]

In this case, abstention has come to the attention of the Court in a far different setting. There is no collision of constitutional principles; this is a state case involving purely state issues, and implicating purely state concerns. Nor is the court acting in its dynamic, equitable role; instead it is responding to litigation in the passive role to which it is obliged by virtue of diversity

[6] See e.g. Judice v. Vail, 430 U.S. 327, 97 S.Ct. 1211 (1977), [State interest in judicial contempt process]; Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 102 S.Ct. 177 (1981), [In damage action under 42 U.S.C. 1983, state interest in administration of state tax system]; Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423, 102 S.Ct. 2515, (1982), [State interest in licensure and discipline of lawyers]; Pennzoil Co. v. Texaco, 481 U.S. 1, 107 S.Ct. 1519, 1989 [State interest in administering appeal bond scheme in civil litigation].

jurisdiction. Comparatively viewed, the federal interest is significantly diminished, while the state interest remains the same. Of course, the measure of that interest will increase or wane on a case by case basis; but it is only appropriate that the interest be considered and accepted or rejected as circumstances dictate.

The suggestion that abstention under the "Younger doctrine" must automatically fail for lack of a pending state proceeding, [brief of petitioner, at pg. 14-15] fails to recognize that "Comity" is the "underlying principle" of abstention. It does not disappear simply because there is no pending state court case. If abstention can be summarily denied for this reason, the following anomaly arises: "Comity" is a sufficiently powerful principle that it can require a federal

court to decline to sit in equity and decide constitutional questions; yet, on the other hand, it may not act when that same federal court is sitting in diversity.[7]

The question implicitly raised by asking if the lower court erred in abstaining under the "doctrine of Younger v. Harris" is whether the doctrine, in the first instance, can be extended to cases which are grounded in diversity? The answer should be yes; the doctrine cannot logically be applicable only where the court is sitting in equity in the consideration of federal constitutional questions.

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[7]A diversity action will almost always fail to have a pending state action, nor will there generally be a federal constitutional question as required in Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515, (1983).

In Louisiana Power and Light Co. v. Thibidoux, 360 U.S. 25, 79 S.Ct. 1070, (1959) the Court abstained in a matter before it on the basis of diversity and based its power to do so on "a deeper policy derived from our federalism" and not from a "technical rule of equity procedure" 360 U.S. at 28, 79 S.Ct. at 1072.

Brillhart v. Excess Ins. Co. of America 316 U.S. 491, 62 S.Ct. 1173 also lends support. Brillhart came to the court as an action in diversity and was remanded for the district court to exercise its discretion in granting a motion to dismiss (dismissal being an act of abstention). The lack of involvement of federal law and the "gratuitous interference with the orderly and comprehensive disposition of a state court" were the primary factors for the court below to consider. 316 U.S. at

495, 62 S.Ct. at 1175-1176, [8]

Abstention decisions should not be restricted to "rigid pigeonholes" as the various doctrines "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes". Pennzoil v. Texaco 481 U.S. 1, 11, 107 S. Ct. 1519, 1526, 95 L. Ed.2d 1, note 9, (1987).

In Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L. Ed.2d 483, abstention was appropriate even though it filled none of the established "categories" considering both "[w]ise judicial administration,

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[8]See also Will v. Calvert Fire Ins. Co. 437 U.S. 655, 664 98 S.Ct. 2552, 57 L.Ed. 504, 2558 (1978) wherein both the plurality opinion and the concurring opinion reference the above language and speak to the importance attached to the handling of state issues as opposed to federal ones in that diversity action.

giving regard to conservation of judicial resources and comprehensive disposition of litigation. 424 U.S. at 817, 96 S.Ct. at 1246.[9] In considering abstention, no "mechanical checklist" can be applied. Moses H. Cohen Memorial Hospital v. Mercury Construction Corporation 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765, (1983).

It was proper for the district court to have considered abstention. That inquiry must, of necessity, involve an overview of the interest of both the State and the Federal Government.

Effective January 1, 1992 all of the laws affecting the exercise of juvenile

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[9] It is noted that even though the majority opinion did not join in Chief Justice Rehnquist's view of "Comity" in either Colorado River (supra.) or in Will Calvert, supra. both cases considered factors well beyond the three part test of Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1983).

court jurisdiction in Louisiana became a part of the Children's Code, LSA-Ch.C. Arts. 100-1657 (Acts 1991, No. 235, Approved July 2, 1991). This comprehensive Code is the compilation "of bits and pieces of law affecting children which [were] scattered through eighty-nine separate titles and codes, from "a" adoption found in R.S. 9:4 through "y" (Youth services, Division of) found in R.S. 46:1901". (LSA-Ch.C. "The Drafting of the Children's Code", pg. V).

The Children's Code, of course, is not the only body of law that one must consult to reference the full range of Louisiana's State Interest in the domestic affairs of its citizens - but the 768 page book is a reasonable start. Thereafter, one might refer to the family laws that do not directly involve the imposition of juvenile court jurisdiction such as the laws

relating to marriage, divorce, community property, child custody, inheritance (forced heirship included in this state), filiation, ownership of property, emancipation of minors, and on and on seemingly ad infinitum. While other states may not have such a Byzantine system of recordation, all of these legal concepts must be covered in each state one way or another.

As explained in New Orleans Public Service Inc. v. Council of New Orleans 109 S.Ct. 2506 (1989), in considering the state's interest "we look to is the importance of the generic proceedings to the state." Thus in Younger, California's interest was in enforcing its criminal laws and not in prohibiting an individual from distributing handbills. Id., at 2516. Similarly, the interest of the state herein must be seen as its interest in the

domestic relations of its citizenry, and not in the adjudication of a singular lawsuit. With the possible exception of law enforcement, what greater interest does a state have?

The length and breadth of the state interest in the case before the bar can be measured by the number of courts of record and state agencies involved to date. The record courts include the Civil District Court for the Parish of Orleans, State of Louisiana for separation, divorce, and child custody; Criminal District Court for the Parish of Orleans, State of Louisiana for the arrest and bonding of Jon Richards; Juvenile Court for the 24th Judicial District, Parish of Jefferson, State of Louisiana for child in need of care and termination of parental rights proceedings; Court of Appeal for the 4th Circuit, State of Louisiana for appellate action taken in

the proceedings in Orleans Parish; Court of Appeal for the 5th Circuit, State of Louisiana for appellate action taken in the proceedings which took place in Jefferson Parish; and the Louisiana Supreme Court for review of rulings by the courts below. The state agencies with direct involvement were the District Attorney's Office for the Parish of Orleans, District Attorney's office for the Parish of Jefferson; New Orleans Police Department; Jefferson Parish Sheriff's Office; and Office of Community Services, child sexual abuse unit - all of whom performed some form of individual investigation for themselves or for another agency as mandated by statute. (Joint Response of Jon A. Richards and Debra Kesler in opposition to the Petition for Writ of Certiorari, pgs. 12-14).

That this is a state issue, one best handled and addressed by the States has been accepted by both the Federal Judiciary

and Congress. From Barber v. Barber, supra. to Thompson v. Thompson, 108 S.Ct. 513 (1988) the federal courts have consistently stated that federal involvement in domestic relations matters would "increase the workload of the federal courts and entangle the federal judiciary in domestic relations disputes with which they have little experience and which traditionally have been the province of the States." 108 S.Ct. at 519.

To date, Congress' acceptance of the State role also appears to be complete. As suggested infra. Congress has had over a century to take action on the Domestic Relations Exception and has declined to do so. And though petitioner cites three federal acts for the purpose of highlighting "a growing presence in the policy making and funding of strategies to combat the child abuse problem" (Brief of

Petitioner, at pg. 15), it is Congress' express intent not to "federalize" the issue. Consider the following legislative history to the acts cited by petitioner:

> ... (2) While there are a limited but rising number of child abuse cases tried in the Federal courts, many states have adopted innovative procedures that have far outpaced Federal law, leaving those children who do enter the Federal system (through military bases, Indian reservations, and from other Federal lands and facilities) inadequately protected. The legislation contained in Title XX is not designed, however, to garner any further Federal jurisdiction over child abuse cases. (emphasis added).
>
> (3) At the same time that many states have moved forward in protecting child victims and witnesses, there is also a great deal of inconsistency and disparity among state laws ... and while this legislation does not contemplate in any way further federalizing child abuse, there is a need for Federal legislation that can serve as a model to states ...(Legislative history of the Crime Control Act of 1990, P.L. 101 - 647, House Report No. 101-681(1), pg. 166). (emphasis added).

The area of domestic relations and child abuse is unique and requires special understanding. That petitioner can sweep this hard earned expertise aside with a simple statement[10] is extraordinary. The Senate Report to the Children's Justice Act recognized that reform was required in so many areas unfamiliar to the federal agencies that the State task forces were far "better equipped to assess ... and recommend needed reforms than a Federal agency or Congressional body". (Legislative History Children's Justice and Assistance Act of 1986, P.L. 99-401, amending the Child Abuse Prevention and Treatment Act, Senate Report No. 99-123, at pg. 7).

The role the national government seeks to play in the area of child sexual abuse

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[10] "The lower federal courts have likewise proved themselves competent to analyze and judge child abuse problems" (Brief of petitioner, at pg. 15, citations omitted).

is to facilitate in "coordinating child abuse prevention efforts among the states"[11]. Of particular concern is the coordination of court proceedings because of the desire to minimize secondary trauma to the child ("secondary revictimization"), the existence of multiple judicial proceedings inherent in the problem, and particularized problems in such areas of evidence, difficulties in prosecution, and competency. (Legislative History Children's Justice Act, supra., pages 7-19; see also Legislative History to Child Abuse Prevention and Treatment Act, supra. at page 7).

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[11]Legislative History Child Abuse Prevention Challenge Grants Reauthorization Act of 1989, P.L. 101-126, transferring the program to the "Child Abuse Prevention and Treatment Act", House Report No. 101-113, pgs. 2-3.

This policy of coordination is defeated where a Federal District Court manages litigation, which it is admittedly ill equipped to handle in the first instance, that involves the same issues and the same facts previously handled by the State's Judicial System. Intrusion is both self-defeating and violative of the principles of comity.

The risk run by parallel proceedings is simply too great. Conflicting judgments will occur because 1) the Federal Court must give a trial De Novo of the evidence previously treated by the State Courts, and 2) Litigants will use the Federal District Court as a Court of Appeal in these type of

cases[12]. This is a risk that the District Judge recognized. He did not abuse his discretion[13] in abstaining under Comity and the Doctrine of Younger v. Harris, supra. The rulings of the courts below were correct.

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[12]Appellants' brief, at page 19, says as much when it is suggested that a domestic litigant who feels aggrieved by the State Court Processes should be allowed to have a Federal Forum. Placing the Federal District Court in the position of Reviewing the State Proceedings is, in itself, sufficient grounds to refuse Jurisdiction [See Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983)].

It is also noted that almost every contested divorce includes a tort of some sort and leaves an unsatisfied litigant who has the potential of seeking a Federal Forum by the device of a State Border and changing the name of the litigation.

[13]Brillhart v. Excess Ins. Co. of America, 316 U.S. at 497, 62 S.Ct. at 1176.

CONCLUSION

FOR THE REASONS AND PREMISES SETOUT ABOVE THIS HONORABLE COURT SHOULD AND OUGHT TO AFFIRM THE JUDGMENTS OF THE COURTS BELOW.

SAMUEL S. DALTON
ATTORNEY FOR
DEBRA KESLER,
RESPONDENT
P.O. BOX 10501
JEFFERSON, LA
70181-0501
(504) 835-4289

PAUL WEIDENFELD
ATTORNEY FOR
JON A. RICHARDS,
RESPONDENT
144 ELK PLACE
NEW ORLEANS, LA
70112
(504) 525-1586